



A TREATISE
ON THE
LAW OF MORTGAGES
OF
REAL PROPERTY.

BY
LEONARD A. JONES,
OF THE BOSTON BAR.

IN TWO VOLUMES.

VOL. I.

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TO THE HONORABLE
GEORGE TYLER BIGELOW, LL. D.,
FORMERLY
CHIEF JUSTICE OF MASSACHUSETTS,
IN TESTIMONY OF THE HIGH REGARD IN WHICH HIS SERVICES
ON THE BENCH ARE HELD,
This Treatise is Inscribed
BY THE AUTHOR.

PREFACE.

THE Law of Mortgages is a subject which cannot be treated altogether with reference to general principles. At the present time two opposite theories of the nature of a mortgage hold about equal sway in this country, and this difference of view, at the foundation of the subject, has naturally led to many divergences in the details of it. It is a subject, too, which legislation, directly and indirectly, largely controls. All that part of it which relates to remedies is closely connected with the systems of Civil Procedure in the several States, which are quite dissimilar. The author has endeavored to follow a natural order of arrangement in this treatise; and while presenting not merely the common law of the subject, but as well the modifications of that law made through statutory enactments and judicial decisions, in order to avoid confusion of statement, and to enable one who consults the book to turn with as little trouble as possible to the statement of the law upon any part of the subject for any State in the Union, he has stated in detail for each State the law upon some of the more important divisions of the subject, in which there is a want of harmony. In this way, at the same time, a fuller presentation of the law

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and of the authorities upon these topics has been made than would otherwise have been practicable.

The author, while endeavoring to state the law with clearness and precision, has, at the same time, endeavored to avoid making the work an unreadable digest of decided cases; and having this in view, he has sought frequently to illustrate abstract statements of the law by giving the facts of cases cited, and by making quotations from the more important decisions; and knowing that such quotations are much more valuable when given *ipsissimis verbis*, he has when consistent with brevity so made them, and added the name of the justice rendering the decision.

It may be questioned whether the author has not cited more cases than there is need of, especially in support of propositions upon which there is a general accord of opinion.¹ It was deemed better, however, to err in citing too many, rather than too few cases; and in view of the purpose of the author to make the book equally applicable

¹ The work contains upwards of fourteen thousand citations of about eight thousand different cases. As showing the growth of the subject it may be mentioned that previous general works upon Mortgages, embracing the law of the subject as applied both to Real and Personal Property, contain each about six thousand cases; and upon that part of the subject treated of in the present work, probably only about four thousand cases. This increase of the number of adjudications upon the subject is made up almost wholly from the decisions of the American Courts, within a comparatively short period. The subject of Power of Sale Mortgages and Trust Deeds alone, which is altogether of recent growth, gives occasion for about a thousand citations.

Of the American edition of the Treatise of Mr. Powell, published just half a

century ago, containing the English learning upon the subject brought down to that time by Mr. Coventry, and the American learning added by Mr. Rand, Chancellor Kent in his Commentaries (vol. 4, p. 180, note) says: "There never were two editors who have been more searching and complete, and gigantic in their labors. The work has become a mere appendage to the notes, and the large collections of the American editor, piled upon the vastly more voluminous commentaries of the English editor, have unitedly overwhelmed the text." He quotes in illustration:—

Conati imponere Pelio Ossam —

— atque Ossæ frondosum involvere Olympum.

Yet such have been the changes and re-statements of the law of this subject, that of all this accumulation of authorities the author has found occasion to use only comparatively few.

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to every part of the United States, the multiplication of authorities from different States was deemed to be desirable ; while in general, several authorities upon the same point, whether from the same tribunal or not, will illustrate the subject in different ways. Numerous as the citations are, many cases have been discarded, especially such early ones as seem to have been superseded by changes in the law or by later and more important decisions. It may be that important cases have, through oversight, been omitted ; yet much care has been used to cite all recent cases of importance bearing upon the topics treated of. In giving the names of Reports, when these are designated by the reporter's name, the system adopted in Abbott's United States Digest, of adding the name of the State, has been followed, except in cases where the context shows what State is referred to. Reports of the Supreme Court of the United States, of the Circuit and District Courts of the United States, and the English Reports, are cited as in the Digest by the reporter's name without any addition.

Finally, the author cannot hope to have attained full accuracy or completeness in his work. For such errors as there may be, the magnitude of the subject and the difficulty of dealing with diverse theories of the nature of a mortgage and with diverse systems of Civil Procedure, may be some excuse. It will be esteemed a great favor if gentlemen of the profession will communicate with the author regarding any omissions or inaccuracies they may observe.

LEONARD A. JONES.

BOSTON, *February 7, 1878.*

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LAW OF MORTGAGES.

THE LAW OF MORTGAGES OF REAL PROPERTY.

CHAPTER I.

I. THE NATURE OF A MORTGAGE.

1. *History of the Development of the Law.*

1. **Mortgages used by the Anglo-Saxons.** — Mortgages, or at least pledges of land in the nature of mortgages, were not unknown to the Anglo-Saxons in England. In at least two ancient charters the transactions are clearly enough defined to show that land was given as security for the payment of money, though, as to the manner and form of the transfer, and the rights of the parties under it, very little can be made out. The most important of these cases is quoted below.¹ It appears from this that the mort-

¹ The translation is taken from a collection of essays of much interest recently published (1876), entitled *Essays in Anglo-Saxon Law*, Appendix, case No. 18, p. 342. See, also, the *Essay on Anglo-Saxon Land Law*, p. 106. It is to be observed that Eadgifu mentioned in this document was queen of Edward the Elder, whose reign was from A. D. 901 to 925. "Eadgifu makes known to the archbishop and the community of Christ's Church how her land at Cooling came [to her]; that is, that her father left her land and charter as he rightfully got, and his parents left them to him. It happened that her father borrowed thirty pounds of Goda, and assigned him the land in pledge for the money, and he held it seven years. Then it happened about that time that all Kentish men were summoned to Hothne on military service; so Sighelm, her father, was unwilling to go to the war with any man's money unpaid, and gave thirty

pounds to Goda, and bequeathed his land to Eadgifu, his daughter, and gave her the charter. When he had fallen in war, then Goda denied the return of the money, and refused to give up the land till some time in the sixth year. Then [her kinsman] Byrhsige Dyrineg firmly pressed her claim, until the Witan, who then were, adjudged to Eadgifu that she should cleanse her father's hand by [an oath of] as much value [namely, thirty pounds]. And she took oath to this effect at Aylesford, on the witness of all the people, and there cleansed her father in regard to the return of the money, with an oath of thirty pounds. Even then she was not allowed to enjoy the land until her friends obtained of King Edward that he forbade him [Goda] the land, if he wished to enjoy any [that he held from the king]; and he so let it go. Then it happened, in course of time, that the king brought so serious charges against Goda, that he was ad-

gagee was in the possession of the land, and that he doubtless had the use of the land in return for the use of the money loaned by him. Upon the payment of the loan it was his duty to render back the land to the mortgagor, and his failure to do so in this case was the occasion of litigation, commencing in the reign of Edward the Elder, extending through the reigns of Æthelstan, Edmund, Eldred, and Edwy, and finally ending in the reign of Edgar. The tribunal was the Witan or national assembly, which was also the highest court of law in the kingdom.

From another charter in which reference is made to a mortgage, it seems that the title to the mortgaged land, at some time and in some way not revealed, became vested absolutely in the mortgagee who conveyed away the land. Slight as the knowledge is which these charters give us in respect to the law of the Anglo-Saxon mortgage of real property, it is of interest; for while we find the elements of our present system of the law of real property in the customary laws of the period preceding the Norman Conquest, we may well expect to find in this source as well the beginnings of the law of mortgage as a part of that system.

2. *Vivum vadium*. — At a later period, as is apparent from

judged to lose charters and land, all that he held [from the king, and his life to be in the king's hands]. The king then gave him and all his property, charters, and lands to Eadgifu, to dispose of as she would. Then said she that she durst not, for [fear of] God, make such a return to him as he had merited from her, and gave up to him all his lands except two hides at Osterland, but would not give up the charters before she knew how truly he would hold them in regard to the lands. Then King Edward died, and Æthelstan took the throne. When it seemed to Goda seasonable, he went to King Æthelstan, and prayed him to intercede with Eadgifu for the return of his charters; and the king then did so, and she returned him all except the charter of Osterland; and he relinquished the charter voluntarily to her, and thanked her with humility for the others. And, further, he, with eleven others, gave an oath to her, for born and unborn, that the matter in dispute was forever set-

tled; and this was done in the witness of King Æthelstan and his Witan, at Hamme, near Lewes. And Eadgifu held the land, with the charters, during the days of the two kings, her sons [Æthelstan and Eadmund]. Then Eadred died, and Eadgifu was deprived of all her property; and two sons of Goda (Leofstan and Leofric) took from Eadgifu the two before-mentioned lands at Cooling and Osterland, and said to the child Edwy, who was then chosen king, that they were more rightly theirs than hers. This then remained so, till Edgar obtained power; and he and his Witan adjudged that they had been guilty of wicked spoliation, and they adjudged and restored to her her property. Then, by the king's leave and witness, and that of all his bishops [and chief men], Eadgifu took the charters, and made a gift of the land to Christ's Church, [and] with her own hands laid them upon the altar, as the property of the community forever."

the Domesday, pledges of land were frequent. Later still, in the time of Glanville, pledges of land had taken two distinct forms, the *vivum vadium* and the *mortuum vadium*. The former denoted a pledge of land when the creditor took possession of the land under the conveyance, and held it for a certain period, during which the rents and profits received by him went towards the payment of the debt. Upon payment of the debt the debtor was entitled to have his lands back again, and might recover them by suit if not voluntarily restored. This was apparently the form of the mortgage referred to in the Anglo-Saxon charter of the tenth century already quoted; and the mortgages mentioned in Domesday seem to imply that possession of the property was in the mortgagee; and later still, in the time of Glanville, the possession seems usually to have followed the security.

3. This form of mortgage is very much like the Welsh mortgage of a later period, which has no condition by which the conveyance is to be void upon payment of the debt, as in the common mortgage, but the mortgagee has the possession of the property assured to him, and receives the rents and profits either in lieu of interest, or in discharge of both principal and interest. Under this form of mortgage the mortgagee had no remedy whatever. He could not sue for the debt. There was no covenant for payment, either express or implied.¹ He could neither compel the mortgagor to redeem nor cut off his right of redemption by foreclosure. In this respect the transaction was like a conditional sale. The mortgagor could redeem at his option; and could enforce his right either at law or in equity. After full payment of the debt from the rents and profits, the mortgagor's right to redeem would be barred, finally, by the lapse of the statutory period of limitation. This form of security, where the rents were received in lieu of interest, was afterwards called the Welsh mortgage.²

¹ *Howel v. Price*, 1 P. Wms. 291; *Lonquet v. Seawen*, 1 Ves. Sen. 402.

² *Rankert v. Clow*, 16 Tex. 9; *Angier v. Masterson*, 6 Cal. 61. The principal distinction between the ancient *vivum vadium* and the more modern Welsh mortgage seems to be, that, while in the for-

mer the rents were applied in satisfaction of the principal, in the latter they were received in satisfaction of the interest, the principal generally remaining undisturbed. But there is one form of Welsh mortgage, or of a mortgage in the nature of a Welsh mortgage, where the property

4. The *mortuum vadium* was the designation of a pledge of land of which the mortgagee did not necessarily receive the possession, or have the rents and profits in reduction of the demand. In the time of Glanville this form of security was looked upon with much disfavor as a species of usury. That the creditor was liable to the penalties of usury if he received money for the use of the loan, and was considered dishonest as well, is a sufficient reason why this kind of security, though not prohibited, was then seldom used.

The *mortuum vadium* spoken of by Littleton is the common law mortgage. It had then become a conditional estate; the condition being that upon payment of the debt at a fixed time, the grantor might reënter, but upon breach of the condition the conveyance became absolute.¹ It was at a later day that the equitable right of redemption after forfeiture became an incident of the mortgage. The nature of the transaction as a mere security for a debt was not then regarded, but the rules applicable to other estates upon condition were enforced with all their strictness. This is illustrated in the statement of Littleton, that if the condition was that the debtor should pay a certain sum of money to the mortgagee, no definite time being fixed for the payment, if the debtor died before making payment, a tender of payment by his heir was void, because the time within which the payment should be made was past, the condition that the debtor should pay being as much as to say that he should pay during his lifetime. But if the condition was that the payment should be made by a day certain, then if the debtor died before that day, his heir or executor might, as his representative, tender the money within the time limited.²

is conveyed to the mortgagee and his heirs, to hold until out of the rents and profits he shall have received both principal and interest. Coote on Mortg. 208.

¹ Littleton's Tenures, lib. iii. c. 5, § 332. "*Of Estates upon Condition.*") Item: If a feoffment be made upon such condition that if the feoffor pay to the feoffee, at a certain day, forty pounds of money, that then the feoffor may reënter; in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mortgage*, and in Latin *mortuum vadium*. And

it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and, if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him forever, and so, dead to him upon condition. And if he doth pay the money, then the pledge is dead as to the tenant."

² Litt. Tenures, lib. iii. c. 5, § 337. "Also if a feoffment be made upon condition that if the feoffor pay a certain sum

5. Such restraints upon the free alienation of lands were imposed after the Norman Conquest under the feudal system then established that it is probable that mortgages were almost unknown in England for the next two hundred years.¹ At length the statute of *Quia Emptores*² restored freedom of alienation to all except the immediate tenants of the crown, and not long afterwards questions relating to the nature of mortgages and the respective rights of the parties began to receive the attention of the courts and of parliament.

6. Growth of the doctrine of an equity of redemption. — In the latter part of the reign of Elizabeth it seems to have been an unsettled question whether an absolute forfeiture of the estate had not been incurred by a non-payment of the debt at the day named in the condition.³ But the right of the mortgagor to redeem after forfeiture seems to have been a recognized right in the reign of Charles I.;⁴ yet even at the close of the reign of

of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter; in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, this is as much to say as if the feoffor during his life pay the money to the feoffee; and when the feoffor dieth then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day; then may the heir tender the money as is aforesaid, for that the time of the tender was not past by the death of the feoffor. Also it seemeth that in such case, where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter. And the reason is for that the executors represent the person of their testator." Followed in *Alsop v. Hall*, 1 Root (Conn.), 346.

¹ Coote on Mortg. 5. "In the twentieth year of William's reign, and on the

completion of Domesday Book, he summoned a meeting of all the principal landholders in London and Salisbury, and accepted from them a surrender of their lands, and re-granted them on performance of homage and the oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, and it was held the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seigniority without his tenant's consent, although the tenants, even of the crown, it would seem, might grant subinfeudations (*i. e.* to hold of themselves) without license. It was further held, the tenant could not subject his lands to his debts by execution of law, for, if he could, he might have effected that circuitously which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he alienate them without the consent of the next collateral heir."

² 18 Edw. I. (A. D. 1325).

³ Goodall's case, 5 Rep. 96; Wade's case, 1b. 115.

⁴ Emanuel College v. Evans, 1 Rep. in

Charles II. an equity of redemption was declared to be a mere *right* to recover the estate in equity after breach of the condition, and not such an estate as was entailable within the statute *de donis*.¹ In this case Chief Justice Hale made the often quoted remark, "By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed." He thought the mortgagor's equity of redemption had already been carried too far. "In 14 Richard II. the parliament would not admit of redemption; but now there is another settled course; as far as the line is given, man will go; and if an hundred years are given, man will go so far, and we know not whither we shall go. An equity of redemption is transferable from one to another now, and yet at common law, if he that had the equity made a feoffment or levied a fine, he had extinguished his equity in law; and it hath gone far enough already, and we will go no further than precedents in the matter of equity of redemption, which hath too much favor already."

Even so late as 1737 it was strenuously argued before the high court of chancery,² that an equity of redemption was not an estate in land of which a husband was entitled to be a tenant by the curtesy. It was insisted the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage; it was compared to the case of a proviso for a reëntry in a conveyance and no entry ever made, and to a condition broken and no advantage ever taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action, or a suit in a court of equity, in order that the estate might be reconveyed to her upon complying with the terms in the mortgage. But Lord Hardwicke declared that an equity of redemption is an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there

Ch. 18. In this case, although the money was not paid at the day but afterwards, it was held that the mortgage term ought to be void, just as it would have been at

law on a payment according to the condition.

¹ Rosearriek v. Barton, 1 Ca. in Ch. 217.

² Casborne v. Scarfe, 1 Atk. 603.

may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

7. When the doctrine was first established.— Courts of equity had become fully established in their authority in the reign of James I., and although many equitable principles now recognized in the doctrine of mortgages were not fully established till long afterwards, it is probable that at this time the subject of mortgages was so far within their jurisdiction as to enable them to relieve the mortgagor from the forfeiture of his rights through failure to pay according to the condition, and to establish the doctrine of the equity of redemption.¹

“No sooner, however, was this equitable principle established than the cupidity of creditors induced them to attempt its invasion, and it was a bold but necessary decision of equity, that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably the rule of law, *Modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the courts of equity to prevent this equitable jurisdiction being nullified by the artifice of the parties.”²

“Once a mortgage always a mortgage,”³ became one of the most important maxims in this branch of the law; and a strict adherence to it has at all times been enforced. The parties have not been allowed to provide by the deed creating the mortgage that at any time, or upon the happening of any event, it shall cease to be a mortgage, and become an absolute conveyance.⁴ Any agreement or stipulation cutting off the right of redemption has always been held to be utterly void.⁵ Even a subsequent release of this right by the mortgagor has always been looked upon with suspicion, and sustained only when made for a proper

¹ Coote on Mortg. 21.

³ Newcomb v. Bonham, 1 Vern. 7.

² Coote on Mortg. 21; and see Price v. Perrie, 2 Freem. 258; Willett v. Winnell, 1 Vern. 488; Bowen v. Edwards, 1 Rep. in Ch. 222.

⁴ Coote, 22; 2 Story Eq. Jur. § 1019.

⁵ See chapter xxii. “REDEMPTION,” also Quatermous v. Kennedy, 29 Ark. 544; Lee v. Evans, 8 Cal. 424.

consideration and without oppression on the part of the mortgagee.¹

8. The different views of the nature of a mortgage at law and in equity. — A mortgage being a qualified conveyance of property, whereby the owner parts with it so far as to make it a security to his creditor, and his creditor holds it in such a way that the owner may, by equitably fulfilling his obligation, have his own again, the question, what are the respective rights and titles of each, is one that lies at the foundation of the law upon this subject. Originally an estate upon condition at law, equity assumed jurisdiction to relieve the mortgagor against an absolute forfeiture upon his default in performing the condition subsequent; and for two hundred years and more a mortgage has been one thing at law, and quite another thing in equity, although the equitable view of the subject has largely encroached upon the legal in courts of law.²

Courts of equity could not alter the legal effect of the forfeiture which followed a breach of the condition, and did not attempt to do so; but they regarded it as in the nature of a penalty which ought to be relieved against. They recognized the purpose of the mortgage as merely a pledge to secure a debt, and declared it unreasonable that the mortgagee should, by the failure of the debtor to meet his obligation at the day appointed, be entitled to keep as his own what was intended as a pledge.³ At law the legal right of the mortgagor to have his estate again was forfeited; but in equity he was allowed still to reclaim it upon payment of his debt with interest. This is the equity of redemption. From the combined influence of rules of law and principles of equity has come the law of mortgages.

¹ Pritchard v. Elton, 38 Conn. 434.

² "The case of mortgages," says Chancellor Kent, "is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent's Com. 138. "It is difficult to conceive," says Mr. Coote, "had the courts of law been so inclined (which it does seem they were), on what principle they

could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy, short of an actual legislative enactment, without disturbing the settled landmarks of property." Coote on Mortg. 17.

³ Coote on Mortg. 19.

The equitable view of a mortgage, as merely a security for the payment of a debt or the performance of some duty, is that which is at the present day so constantly presented both in theory and practice, that it is difficult to realize that the rules of the common law in respect to it remain for the most part unaltered, and the transaction is still a conveyance conditional upon the non-payment of the debt on a day certain, and that upon a breach of the condition the mortgagor at law is without right or remedy. The whole legal estate upon the default passes irrevocably to the mortgagee. But at this point a court of equity allows and enforces the right of redemption; and the jurisdiction of courts of equity to give this remedy is fully recognized in courts of law.

9. In courts of law the rigor of the doctrine, in respect to the conditional character of the mortgage, was not at all abated in England until the enactment of the statute of 7 Geo. II. ch. 20,¹ which permitted a mortgagor, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of the mortgage, and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or reconvey the mortgaged premises to the mortgagor, or to such other person as he should for that purpose nominate and appoint. "In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction, to enforce redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a reconveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a reconveyance on equitable terms."²

¹ Reenacted in New Jersey, December 3, 1794, Nix. Dig. (4th ed.) 608. See, also, Virginia Code (1873), c. 131, § 21; Davis v. Teays, 3 Gratt. (Va.) 283; Connecticut Gen. Sts. (1875), p. 471.

² Per Mr. Justice Deane, in *Shields v. Lozeau*, 34 N. J. L. 496.

The statute is strictly construed, and is not applicable in any case in which the mortgagor is himself the actor. It is applicable only in the cases mentioned in the preamble and introductory words of the statute, and was not intended to supplant bills for redemption which afford more complete remedy.¹

10. "The respective claims of mortgagor and mortgagee in courts of common law and of equity afford one notable instance of the rise of a trust through the mere existence of another legal relationship.² In a court of common law, a mortgage is an ordinary conveyance following upon a contract for a sale or for a lease. The mortgagee takes the place of the mortgagor as owner of the land, and the mortgagor that of the mortgagee as owner of the money borrowed, the subsequent repayment of the money and reconveyance of the land being regulated by what is in fact nothing else than a subsidiary contract. In a court of equity, the mortgagee is recognized as having nothing more than the sort of security for his debt which is provided by a conditional power of sale, and, whether he be in possession of the land or not, is treated as the mere trustee of the land for the benefit of the mortgagor and his heir. The money lent descends, on the death of either of the parties, as a debt due from the one, or his executors, to the other, or his executors."

11. The modern common law doctrine of mortgages. — At common law the legal estate vested in the mortgagee and was forfeited upon default. Equity established the right of redemption after default. From these principles is derived the doctrine of mortgages as it exists at the present day, in England and in a large part of our own country. The legal title passes to the mortgagee by the deed, but the mortgagor has after default a right to redeem, which he may enforce in equity. A mortgage is one thing at law and another in equity; in the one court it is an estate and in the other a security only. The mortgagee has certain legal remedies and the mortgagor certain equitable remedies. These have been so adjusted that a perfectly defined system is the result. The jurisdiction of courts of law and of courts of equity upon this

¹ Good-title v. No-title, 11 Moore, 491; ² Mr. Sheldon Ames, in his *Science of Doe v. Clifton*, 4 Ad. & E. 809; Shields *Jurisprudence*, p. 269. v. Lozeur, 34 N. J. L. 496.

subject are mutually recognized. Courts of law have so far adopted the principles of equity that they allow the legal title of the holder of the mortgage to be used only for the purpose of securing his equitable rights under it. The mortgagee, for the purpose of protecting and enforcing his lien against the mortgagor, is allowed the remedies of an owner; he may enter into and hold possession, and take the rents and profits in payment of his mortgage debt, and may have his action of ejectment to recover such possession, and hence is sometimes called the owner.¹ The mortgagee has something more than a mere lien; he has a transfer of the property itself and a legal estate in it, giving him a standing at law as well as in equity.² His interest can be called a lien only in a loose and general sense, in contradistinction to an absolute and indefeasible estate.³

In equity a mortgage of land is regarded as a mere security for a debt or obligation, which is considered as the principal thing, and the mortgage only as the accessory.⁴ The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security; but for other purposes the mortgage is a mere security for the debt.⁵

A recital in a mortgage that the note secured is collateral to the mortgage does not change the character of the instruments or their relation to each other under the general rule as to principal and incident; and the fact that the note is indorsed by a third person makes no difference.⁶

As to all persons except the mortgagee and those claiming under him, it is everywhere the established modern doctrine that a mortgagor in possession is at law, both before and after breach of the condition, the legal owner. This is the rule not merely in courts of equity but in courts of law as well. Lord Mansfield, by his decisions upon the subject of mortgages, did much to naturalize these equitable doctrines in courts of law. In a case before the King's Bench, he said: "It is an affront to common sense to say the mortgagor is not the real owner;" and therefore he held that a mortgagor in possession gains a settlement, because

¹ *Clark v. Reyburn*, 1 Kans. 281.

⁴ *Timms v. Shannon*, 19 Md. 296.

² *Barnard v. Eaton*, 2 Cush. (Mass.) 294, 304.

⁵ *Glass v. Ellison*, 9 N. H. 69.

³ *Conard v. Atlantic, &c.* 1 Pet. 386, 441; *Evans v. Merriken*, 8 G. & J. (Md.) 39, 47.

⁶ *Catlin v. Henton*, 9 Wis. 476.

the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security.¹

Again, in construing a will, he held that whatever words were sufficient to carry the money due on a mortgage would carry the interest in the land along with it, saying,² "that a mortgage is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow, notwithstanding the statute of frauds."

12. Lord Mansfield's views.—It is true that some opinions expressed by Lord Mansfield would seem to lead to the conclusion that he regarded a mortgage even at law as merely a security for a debt, and not a legal conveyance.³ "Lord Mansfield, indeed," says Mr. Coventry,⁴ "appears to have entertained mistaken conceptions on this and other subjects connected with the law of mortgages. His chief error seems to have been in mixing rules of equity with rules of law, and applying the former in cases where the latter only ought to have prevailed."

An unqualified adoption of some of the expressions of Lord Mansfield is inconsistent with a legal view of the nature of mortgages; it would lead to the conclusion that a mortgage is

¹ *The King v. St. Michael's*, Doug. 630.

² *Weston v. Mowlin*, 2 Burr. 969, 978, decided in 1760.

³ See, also, *Ren v. Bulkeley*, Doug. 292; *Eaton v. Jaques*, 2 Dong. 455.

⁴ In note to *Powell on Mortg.* 267, n. Lord Redesdale, in *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 65, speaking of Lord Mansfield's tendency to give courts of law the power of courts of equity, said: "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the

distinction between them which subsists with us is not known; and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the due administration of justice; and, though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different."

merely a security and not an estate in the land. The English courts by universal consent have refused to adopt this conclusion ; but in this country his lead has been followed in nearly half of the states ; and the adoption of equitable principles by courts of law has been followed by legislative enactments taking from the mortgagee the right of possession, so that in these states it is the established doctrine that a mortgage confers no title or estate upon the mortgagee, but only a security. The legal character of the mortgage has wholly given place to the equitable.

13. The courts of New York at an early day took the lead in this direction. The first important step was to deny the legal character of the mortgagee's title prior to a breach of the condition and a taking of possession by the mortgagee in consequence.¹ Before default he was not allowed to take possession ; on the contrary, the mortgagor in possession could maintain trespass against him.² But after a breach of the condition and possession taken by the mortgagee, he was regarded as invested with the legal estate.³ The right to take possession even upon a breach of the condition was finally taken away by the Revised Statutes.⁴ This enactment was regarded as completing the change in the nature of the mortgages and removing from them the last remaining common law attribute.

And yet an examination of the cases in New York in which questions in regard to the nature of mortgages are involved and discussed shows considerable conflict and contradiction of views. This is especially the case with the decisions prior to the statute taking from the mortgagee the right to recover possession of the mortgaged property ; and even since that statute, although in theory the legal title remains in the mortgagor until foreclosure, it has been frequently admitted by judges and legal writers, that for some purposes and in some cases his interest must be treated and regarded as a title for the purpose of protecting his equitable rights.⁵ When the mortgagor's interest is regarded as the legal estate in the land, it is undoubtedly a misnomer to call it an equity

¹ *Phyfe v. Riley*, 15 Wend. (N. Y.) 248.

² *Bryan v. Butts*, 27 Barb. (N. Y.) 503 ; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534.

³ *Bolton v. Brewster*, 32 Barb. (N. Y.) 389.

⁴ 2 R. S. 312, § 57, enacted 1828.

⁵ *Thomas on Mortg.* 16 ; *Hubbell v. Moulson*, 53 N. Y. 225 ; *White v. Rittenmyer*, 41 Iowa, 268, 271.

of redemption either before or after default.¹ But although the term has ceased to be an accurate description of his right in the land, it has an established place among legal terms, and doubtless will continue to be used to describe his interest, notwithstanding the change made in some states as to his actual rights.

14. Incongruities in both theories.—Many attempts have been made to state a perfectly harmonious and consistent system of law in regard to mortgages; but complete success has never attended them. On the one hand, the modern common law view of mortgages, by which the mortgagee is regarded as the owner of the legal estate for the purpose of protecting and enforcing his rights, and the mortgagor is regarded as the legal owner as against every other person, is objected to as presenting the incongruous position that one person may be the legal owner for one purpose, and at the same time another person may be the legal owner for another purpose; that in one court the mortgagee is the legal owner, and in another the mortgagor is the legal owner; that after the legal title has passed to the mortgagee by a legal conveyance, it may be defeated by the act of the mortgagor from whom the title has passed, merely by payment before forfeiture.²

On the other hand, it was thought by regarding a mortgage both at law and in equity as a mere security to make a more harmonious and consistent doctrine regarding this instrument. It is admitted that this doctrine is anomalous. That a legal conveyance does not pass a legal title is not in accordance with legal principles.³ Moreover, it has been found that in order to secure the equitable rights of parties, the mortgagee's interest must in some cases be treated and regarded as a title. This is admitted by Mr. Justice Andrews in a recent case before the Court of Appeals of New York;⁴ and he mentions instances in the decisions of that state where the mortgagee's interest has been so treated and regarded notwithstanding the doctrine that he has a lien only. It is claimed, however, that no title in a strict sense vests in him; but only that his interest for some purposes is in the nature of a legal title. He is treated as if he had a legal title, by being pro-

¹ Per Earl, C., in *Trimm v. Marsh*, 54 N. Y. 599; *Chick v. Willetts*, 2 Kans. 384, 271. per Crozier, C. J.

³ *White v. Rittenmyer*, 30 Iowa, 268,

⁴ *Hubbell v. Moulson*, 53 N. Y. 225.

² *White v. Rittenmyer*, 30 Iowa, 268, 271.

tected in his possession, when he has once acquired it, until the debt is fully paid.¹ The only remedy for recovering possession from him in such case is by a bill in equity to redeem,² as is the case where the mortgagee is regarded as holding the legal estate.

In other ways also the mortgagee is treated as holding an estate. He is deemed a purchaser to the extent of his interest, and is protected in his rights in the same way and to the same extent as a purchaser of an absolute estate.³ As an estate in him, his interest is protected against a claim of dower by the wife of the mortgagor when she has released this right in the mortgage, although she may be entitled to it in the equity of redemption after this has been released to him, or otherwise acquired by him.⁴

And so also a title acquired by the mortgagor after making the mortgage enures, by force of the covenant of warranty contained in it, to the benefit of the mortgagee.

15. The practical distinction between these two views.—What, then, are the practical distinctions between a mortgage regarded as a legal estate in the mortgagee, and a mortgage regarded as a mere personal lien? In what respect are the rights of both the mortgagor and the mortgagee, where the one view prevails, the same as they are where the other prevails; and in what respects are their rights different under the one doctrine from what they are under the other?

In the first place, wherein are the two doctrines in harmony as regards the rights and interests of the mortgagor? Everywhere the mortgagor's interest in the land may be sold upon execution; his widow is entitled to dower in it; it passes as real estate by devise; it descends at his death as real estate to his heirs; it gives him a right of settlement as an owner of real estate; he is a freeholder; he may maintain a real action for the land against a stranger, and the mortgage cannot be set up as a defence.

In the second place, wherein are the rights and interests of the mortgagee the same whether regarded under the one theory or the other? Everywhere it is held that he has no such estate as can

¹ *Mickles v. Townsend*, 18 N. Y. 575, (N. Y.) Ch. 417; S. C. 2 Cowen, 246; 584. *Ledyard v. Butler*, 9 Paige (N. Y.), 132.

² *Hubbell v. Moulson*, 53 N. Y. 225. 137.

³ See *Frishie v. Thayer*, 25 Wend. (N. Y.) 396, 399; *James v. Johnson*, 6 Johns. (N. Y.) 162. ⁴ *Van Dyne v. Thayer*, 19 Wend. (N. Y.) 396, 399.

be sold on execution; his widow has no right of dower in it; upon his death the mortgage passes to his personal representatives as personal estate; and it passes by his will as personal property.

The practical distinctions between these views are these: Under the common law view, as we may term the former, the mortgagee is entitled to immediate possession of the mortgaged property as an incident to the title when not restrained by the terms of the mortgage; and upon default he is always entitled to the possession and may recover it by action at law; whereas, under the equitable view, the mortgagor is entitled to possession until foreclosure, unless perhaps he may by express contract give this right to the mortgagee. This is the great difference resulting from these different theories. In large degree resulting from these different ways of viewing the interest of the parties follow the further distinctions: that while generally, under the former view of the law, a tender or payment to defeat the mortgagee's title must be made at or before the law day, as the day of payment is termed, under the latter view a payment at any time, though after default, reverts the interest in the mortgagor; and while under the former view it is generally held that a transfer of the mortgage interest can only be made by an assignment or deed duly executed as a conveyance, under the latter view it is held that a mere transfer of the mortgage note by indorsement or delivery passes the interest in the land as an incident of the debt. These two distinctions do not, however, necessarily and inevitably attend the different theories.

16. How then may a mortgage at the present day be defined? — Baron Parke, speaking of the mortgagor, said: "He can be described only by saying he is a mortgagor."¹ In the same way it may be said that the most accurate and comprehensive definition of a mortgage is that it is a mortgage. A definition broad enough to cover any view of the transaction, and any form of it, can only be that it is a conveyance of land as security. This embraces the two things essential to constitute a mortgage. If more be attempted, it results in a description of some one of the many forms which a mortgage may take. In a note are given definitions and descriptions of mortgages by several eminent authors and judges. But to define the different kinds of

¹ *Litchfield v. Ready*, 20 L. J. Ex. 51.

mortgages, and the many different rights under them, is the service attempted by a treatise on the subject.¹

¹ "A mortgage at common law may be defined to be an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. It is, therefore, an estate defeasible by the performance of a condition subsequent." Mr. Washburn's Real Prop. c. 16, § 1.

"The mortgage proper, *mortuum vadium*, is an assurance to the creditor of the whole or part of the debtor's general property, in real or personal estate, conditional upon the non-payment, and redeemable upon payment, of a debt at a fixed time, and upon breach of the condition the assurance becomes absolute, but remains subject to an equitable right of redemption until the expiration of a certain period; unless the right be sooner foreclosed by judicial process at the suit of the creditor, or be destroyed by sale under judicial process or under a power incident to the security." Fisher on Mortg. (3d ed.) p. 2.

"A mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a pledge and security for the repayment of a sum of money borrowed, with a proviso that such conveyance shall be void on payment of the money and interest on a certain day; and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still an equity of redemption, that is, a right in equity on payment of the principal, interest, and costs, within a reasonable time, to call for a reconveyance of the lands." Mr. Coventry in Powell on Mortg. p. 4. Almost precisely the same words are used to describe a mortgage by Mr. Cruise. 1 Dig. of Law of Real Prop. (Am. ed.) tit. xv. ch. i. § 11.

"A mortgage may be defined to be a debt by specialty, secured by a pledge of

lands, of which the legal ownership is vested in the creditor, but of which in equity the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence or their own laches." Coote on Mortg. p. 1.

"A mortgage in fee is an estate upon condition defeasible by the performance of the condition according to its legal effect." *Erskine v. Townsend*, 2 Mass. 495; *Carter v. Taylor*, 3 Head (Tenn.), 30; *Briggs v. Fish*, 2 D. Chip. (Vt.) 100.

"A mortgage is a deed whereby one grants to another lands upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified at a certain day, the grant shall be void." *Montgomery v. Bruere*, 1 Southard (N. J.), 268.

"At common law a mortgage is defined to be a deed conveying lands conditioned to be void upon the payment of a sum of money, or the doing of some other act." *Lund v. Lund*, 1 N. H. 41.

"A mortgage is a conditional conveyance of land, designed as a security for the payment of money, the fulfilment of some contract, or the performance of some act, and to be void upon such payment, fulfilment, or performance." *Mitchell v. Burnham*, 44 Maine, 299.

"A mortgage is defined to be a conveyance of an estate, by way of pledge, to secure a debt, or the performance of some act, such as the payment of money, or the furnishing of an indemnity, and to become void on payment or performance agreeably to the prescribed condition." *Wright v. Cooper*, 37 Vt. 179.

In New Hampshire it is declared by statute that "every conveyance of lands, made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage." Gen. Stat. 1867, c. 122, § 1.

By the Code of California, a mortgage is defined to be "a contract, by which

2. *The Nature of a Mortgage in the different States.*

17. **Generally.** — As already stated, the conflicting views of the nature of mortgages entertained at law and in equity have resulted in the just and harmonious system, which is now administered in the courts of England and in most of the courts of the older States of America. In these courts a mortgage is regarded as a conveyance in fee, and this construction is thought best adapted to give to the creditor full protection in preserving and enforcing his security, while at the same time the debtor is secured in his right to redeem. In other states, however, this system has been changed, for the most part by statute, so that a mortgage is regarded as merely a pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first. There are also some few modifications of each.

In examining the various questions that arise under the law of mortgages, it is often important to distinguish between the opinions of courts acting under these different views of the nature of a mortgage. On several topics frequent reference will be made to the distinguishing features of the two systems. On these topics authorities from several states having the same system will be harmonious, but will differ from those from several states in which the other system prevails. It was therefore thought to be best to give briefly, under the name of each state, the law there in force upon this fundamental matter of the nature of the conveyance in mortgage, as announced by the courts, or enacted by statute.

18. **In Alabama** a mortgage passes to the mortgagee, as between him and the mortgagor, the estate in the land. It confers something more than a mere security for a debt: it confers a title under which the mortgagee may take immediate possession, unless it appears by express stipulation, or necessary implication, that

specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Civil Code, 1872, § 2920; adopted also by Civil Code of Dakota, 1871, § 1608.

In Florida it is provided that all conveyances securing the payment of money shall be deemed mortgages. Bush's Dig. 1872, p. 605.

the mortgagor may remain in possession until default.¹ After the law day, the legal estate is absolutely vested in the mortgagee, and the mortgagor has nothing left but an equity of redemption.² Nothing but payment, or a release of the mortgage, or a reconveyance, can operate in a court of law, to revest the title in the mortgagor; and it is questioned whether payment alone after the law day is sufficient.³ But as against all persons but the mortgagee and his assigns, the mortgagor is regarded as the proprietor and is entitled to the possession.⁴

19. In **Arkansas** the mortgage was, in an early case, considered as having the legal estate after condition broken, following in this respect some of the earlier cases in New York.⁵ In a later case, it is said that the legal title passes, at law, directly to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage; and that the right of possession follows the legal title unless it be expressly provided in the deed, or clearly appears to be the intention of the parties, that the mortgagee shall remain in possession until default.⁶ Whenever he is entitled to possession, he may acquire it by an action of ejectment. He may upon default pursue any or all of his remedies: may bring actions for the debt, for possession, and to foreclose the equity of redemption and sell the land.⁷

20. In **California** a mortgage does not convey the legal title for any purpose, either before or after condition broken. It is a mere security for the payment of money, and passes no estate in the land. This is the declaration of the Code.⁸

“It was from a consideration of the character of the instru-

¹ *Duval v. McLoskey*, 1 Ala. 708; *Knox v. Easton*, 38 Ala. 345.

² *Paulling v. Barron*, 32 Ala. 9; *Barker v. Bell*, 37 Ala. 354.

³ *Powell v. Williams*, 14 Ala. 476; *Barker v. Bell*, *supra*.

⁴ *Knox v. Easton*, *supra*; *Mansony v. U. S. Bank*, 4 Ala. 735.

⁵ *Fitzgerald v. Beebe*, 2 Eng. (Ark.) 311; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *Reynolds v. Canal & Banking Co. of N. O.* 30 Ark. 520.

⁶ *Kannady v. McCarron*, 18 Ark. 166.

⁷ *Fitzgerald v. Beebe*, *supra*; *Gilchrist v. Patterson*, 18 Ark. 575; *Reynolds v. Canal & Banking Co. of N. O.* 30 Ark. 520.

⁸ Civil Code, 1872, § 2927; *McMillan v. Richards*, 9 Cal. 365, where Mr. Justice Field examines the subject at great length; *Dutton v. Warschauer*, 21 Cal. 609; *Mack v. Wetzlar*, 39 Cal. 247; *Goodenow v. Ewer*, 16 Cal. 467; *Kidd v. Teeple*, 22 Cal. 255.

ment," says Chief Justice Field,¹ "as settled by these decisions and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or incumbrance, and not passing any estate in the premises."²

It is fully settled that a mortgage does not convey the title, but only creates a lien on the property, the title remaining in the mortgagor subject to the lien.³ It is provided by statute, that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage.⁴ Entry and possession by the mortgagee do not affect the nature of his interest. They can neither abridge nor enlarge that interest, nor convert what was previously a security into a seisin of the freehold.⁵ But if the mortgagee, after condition broken, take possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits, and apply them to the debt secured, and that he is to hold possession until the debt is paid.⁶ This possessory right may be transferred by express terms, though it does not pass by an ordinary assignment.⁷ Even an absolute deed without any defeasance, if in fact made to secure a debt, so that in equity it is a mortgage, passes no title to the grantee.⁸ Of course, under this view of the nature of a

¹ *Dutton v. Warschauer*, 21 Cal. 609, 623.

² Stat. 1851, § 260 declared a mortgage shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession, without a foreclosure and sale. Prior to this statute a mortgage was not a conditional estate to become absolute on a breach of condition, as at common law. *Skinner v. Buck*, 29 Cal. 253.

³ *Mack v. Weizlar*, 39 Cal. 247; *Harp v. Calahan*, 46 Cal. 222; *Jackson v. Lodge*, 36 Cal. 28; *Boggs v. Hargrave*,

16 Cal. 559; *Fogarty v. Sawyer*, 17 Cal. 589; *Bludworth v. Lake*, 33 Cal. 255; *Carpentier v. Brenham*, 40 Cal. 221; *Hafley v. Maier*, 13 Cal. 13.

⁴ Civil Code, § 2927. The owner may make an independent contract for the mortgagee's possession. *Fogarty v. Sawyer*, 17 Cal. 589.

⁵ *Nagle v. Macy*, 9 Cal. 426.

⁶ *Frink v. Le Roy*, 49 Cal. 314; *Dutton v. Warschauer*, 21 Cal. 609.

⁷ *Dutton v. Warschauer*, *supra*.

⁸ *Jackson v. Lodge*, 36 Cal. 28.

mortgage, payment after default operates to discharge the lien equally with payment at the maturity of the debt.¹

21. So in Colorado a mortgage is considered a security only, and does not before foreclosure confer any right of entry on the mortgagee.² But it seems that a mortgagee who has acquired possession may retain it; and that he may recover the property by ejectment against third persons not holding under the mortgagor.³

22. In Connecticut a mortgage passes the legal estate subject to be defeated by performance of the condition, and the mortgagee may maintain ejectment; but the mortgagor is to be regarded as the owner of the property, subject to the rights of the mortgagee to enforce payment of his debt by means of his title.⁴ When the debt is satisfied after forfeiture, if the legal title be permitted to remain vested in the mortgagee, he holds it in trust for the mortgagor.⁵ The mortgage when paid is no longer an incumbrance, though it may be a cloud on the title.⁶ By the adoption in courts of law of equitable principles as to the effect of a mortgage, that it is a conveyance merely by way of pledge for the debt, and that the mortgagee holds the title solely for this purpose, a just and harmonious system is constructed.⁷ The mortgagor is the owner of the mortgaged land as against every one but the mortgagee. His equity of redemption may be devised, granted, levied upon, and set off in execution. The wife of a mortgagor is entitled to dower, and the husband of a mortgagor to curtesy. A mortgagor in possession may acquire a settlement, may maintain trespass against his mortgagee, and may take the emblements, without being liable to account; and although the mortgagee has only a chattel interest, — a mere pledge for the payment of the debt, — yet the legal title vests in him upon the execution of the

¹ *Johnson v. Sherman*, 15 Cal. 287.

Dudley v. Cadwell, 19 Conn. 218, 227; *Phelps v. Sage*, 2 Day (Conn.), 151.

² *Drake v. Root*, 2 Col. 685, per Hall, C. J.

⁶ *Town of Clinton v. Town of Westbrook*, 38 Conn. 9; *Dotan v. Russell*, 17 Conn. 146, 154; *Griswold v. Mather*, 5 Conn. 435, 440; *New Haven Savings Bank v. McPartlan*, 40 Conn. 90.

³ *Eyster v. Gaff*, 2 Col. 228.

⁴ *Chamberlain v. Thompson*, 10 Conn. 251; *Beach v. Clark*, 6 Conn. 354; *Rockwell v. Bradley*, 2 Conn. 5; *Middletown Sav. Bank v. Bates*, 11 Conn. 519, 523.

⁷ *Bates v. Coe*, 10 Conn. 280, 294; and see *Lacon v. Davenport*, 16 Conn. 331.

⁵ *Cross v. Robinson*, 21 Conn. 379, 387;

mortgage, subject to be defeated only on performance of the condition, and after condition broken the only relief for the mortgagor is in equity.¹

23. In Dakota Territory a mortgage does not entitle the mortgagee to the possession, but after the execution of it the mortgagor may agree to such change of possession upon a new consideration.²

24. In Delaware a mortgage, as between the mortgagor and mortgagee, is only a security for the payment of the debt, and, so long as the mortgagor continues in possession, does not convey the legal title to the mortgagee; but in the mean time it is a lien of so high a nature, that it is not divested by a sale of the premises on a judgment subsequently obtained against the mortgagor. Yet after breach of the condition and possession obtained by the mortgagee, the legal title is in the mortgagee, and it is no longer in the power of the mortgagor, or any one claiming under him, to recover possession by ejectment.³ As against every one but the mortgagee, the mortgagor in possession before foreclosure is regarded as the real owner and a freeholder, with the civil and political rights belonging to that character.⁴ The mortgagee may, upon breach of the condition, use at the same time all the remedies the law affords both against the person and the property; and he cannot, without some special equity in favor of the debtor, be restrained from proceeding at his election upon either or both his remedies.⁵

25. In Florida a mortgage is not deemed a conveyance so as to entitle the mortgagee to recover possession without a foreclosure.⁶

It is held, however, that a deed of trust conveying land to trustees, with power to sell and convey it in fee and apply the proceeds to the payment of certain liabilities of the grantor, is not a mortgage, which, by the laws of this state, is construed not

¹ Chamberlain v. Thompson, 10 Conn. 243.

² Civil Code, 1871, § 1620.

³ Hall v. Tunnell, 1 Houst. (Del.) 320.

⁴ Cooch v. Gerry, 3 Har. (Del.) 280.

⁵ Newbold v. Newbold, 1 Del. Ch. 310.

⁶ Bush Dig. of Stat. 1872, pp. 611,

to pass an estate in fee, but is a conveyance which vests the legal title in the trustees.¹

26. In Georgia a mortgage is a mere security for a debt, and the mortgagee can neither enter nor maintain ejectment.² All he can do is to foreclose and sell, and make his money out of the sale; and the rents and profits belong to the mortgagor until the sale, for the reason that the title remains in him until the sheriff sells him out, and puts another in his place.³ No title passes by the mortgage: it is only by foreclosure that the title is changed.⁴ It is now declared in the Code that a mortgage is only a security for a debt, and passes no title.⁵

27. In Illinois it is held, in accordance with the rulings of the English courts of common law jurisdiction, that, as an incident to the ownership in fee by the mortgagee, he can enter before condition broken or bring ejectment, unless the mortgage provides that the mortgagor shall retain possession. In such case, and always upon breach of the condition, the mortgagee may bring his action without giving the party in possession any notice to quit.⁶ The condition is broken when one or more instalments are due and unpaid; because, the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition. The mortgagee may pursue all his remedies at the same time: he may proceed against the debtor personally; against the property by bill in chancery for a strict foreclosure, or for a foreclosure and sale; or, when the debt is all due, by *scire facias*; may bring ejectment for the possession, or make peaceable entry.⁷ But even after condition broken, a mortgage is not an absolute outstanding title of which a stranger can take advantage to defeat a recovery in ejectment by the mortgagor.⁸ Except as

¹ *Soutter v. Miller*, 15 Fla. 625.

² *Vason v. Ball*, 56 Geo. 268; *Davis v. Anderson*, 1 Geo. 176; *Ragland v. Justices*, &c. 10 Geo. 65; *Elfe v. Cole*, 26 Geo. 197; *United States v. Athens Armory*, 35 Geo. 344; *Seals v. Cashin*, 2 Geo. Dec. 76.

³ *Vason v. Ball*, *supra*, per Jackson, J.

⁴ *Burnside v. Terry*, 45 Geo. 621; *Jackson v. Carswell*, 34 Geo. 279.

⁵ Code, 1873, § 1954.

⁶ *Carroll v. Ballance*, 26 Ill. 9; *Vansant v. Allman*, 23 Ill. 33; *Delahay v. Clement*, 3 Scam. 202; *Nelson v. Pinegar*, 30 Ill. 473; *Jackson v. Warren*, 32 Ill. 331; *Pollock v. Maison*, 41 Ill. 516; *Harper v. Ely*, 70 Ill. 581.

⁷ *Karnes v. Lloyd*, 52 Ill. 113; *Erickson v. Rafferty*, 79 Ill. 209.

⁸ *Hall v. Lance*, 25 Ill. 277.

against the mortgagee, the mortgagor is regarded for all beneficial purposes as the owner of the land.¹

28. In Indiana the common law doctrine, that the legal estate vests in the mortgagee, was adhered to many years, as appears by the earlier cases; but it no longer prevails. The settled doctrine in this state is that a mortgage is but a lien on the land as a security for the debt, and that the legal title remains in the mortgagor, subject to the lien of the mortgage.² It is provided by statute that in the absence of stipulations to the contrary, the mortgagor until foreclosure may retain possession of the mortgaged estate.³

29. Iowa.—The interest of the mortgagee is regarded as a lien upon the land for the debt, which may, by certain proceedings, ripen into a title, or rather may divest the title of the mortgagor. Some act of the mortgagee is necessary, that he may acquire an indefeasible title which the mortgagor will not be able to defeat by redemption. The interest of the mortgagor is an estate of inheritance, which is in no way affected by the mortgage before entry and foreclosure, except by the lien created. The fact that a mortgage confers upon the mortgagee a right of entry upon breach of the condition confers upon him no additional right, inasmuch as the right exists under the law, without such provision.⁴ It is now provided by statute that in the absence of stipulations to the contrary the mortgagor retains the legal title and the right of possession.⁵

30. In Kansas the legal estate remains in the mortgagor after making a mortgage, and it is provided by statute that, in the absence of stipulations to the contrary, he may retain possession of the mortgaged estate.⁶

¹ *Fitch v. Pinckard*, 4 Scam. (Ill.) 69; *Vallette v. Bennett*, 69 Ill. 632. mortgagee could recover possession at any time unless restrained by the terms of the mortgage.

² *Fletcher v. Holmes*, 32 Ind. 497, 513; *Francis v. Porter*, 7 Ind. 213; *Morton v. Noble*, 22 Ind. 160; *Grable v. McNulloh*, 27 Ind. 472; *Reasoner v. Edmundson*, 5 Ind. 393. ⁴ *White v. Rittenmyer*, 30 Iowa, 268; *Courtney v. Carr*, 6 Iowa, 239; *Hall v. Savill*, 3 Greene (Iowa), 37.

⁵ Code, 1873, p. 357.

³ 2 G. & H. Stat. p. 335. Prior to 1843, when this statute was passed, the

⁶ Dassel's Stat. 1876, c. 68, § 1.

“Some of the states still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theories is their nomenclature. In this state, a clear sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases — without meaning except in reference to those theories — with which our reflections are still embarrassed, the legal profession, on the bench and at the bar, would more readily understand and fully realize the new condition of things.”¹

31. In Kentucky a mortgage passes the legal title to the mortgagee. Upon a breach of the condition, or before a breach, when not restrained by the terms of the mortgage, he may recover possession of the property.² Upon a breach of the condition, also, the title becomes absolute in the mortgagee at law. The only right which the mortgagor has is an equity of redemption. He cannot prevent the legal operation of the deed by showing that it was fraudulently executed by him. This is neither a valid, legal, nor equitable defence.³

32. In Louisiana a mortgage is a species of alienation, but not a sale. It is an alienation of a right on the property, not of the property itself. The title, as well as the possession, remains in the owner.⁴

The Civil Code of this state defines a mortgage as “a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

“Mortgage is a species of pledge, the thing mortgaged being bound for the payment of the debt, or fulfilment of the obligation.

“The conventional mortgage is a contract, by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession.”⁵

¹ Chick v. Willetts, 2 Kans. 384.

³ Brookover v. Hurst, *supra*.

² Stewart v. Barrow, 7 Bush (Ky.), 368;

⁴ Ducland v. Rousseau, 2 La. Ann. 168.

Brookover v. Hurst, 1 Met. (Ky.) 665;

Redman v. Sanders, 2 Dana (Ky.), 68.

⁵ Civ. Code, 1870, arts. 3278, 3279, 3290.

A conventional mortgage is one founded upon the covenants of the parties in contradistinction to a legal mortgage.

33. In Maine a mortgage vests the mortgagee with the legal estate,¹ and it is provided by statute that he may enter before breach of the condition, when there is no agreement to the contrary.² The mortgagor, as to every one but the mortgagee, is considered as having the legal estate and the power of conveying it or incumbering it subject to the lien of the mortgage.³

34. Maryland. — The mortgagee has the legal estate, and is entitled to possession immediately upon the execution of the mortgage, unless there is some agreement of the parties to the contrary.⁴ Ordinarily he may pursue all his remedies at the same time.⁵ As to all other persons, the mortgagor is deemed the owner. He may, therefore, when the mortgage allows him to remain in possession until default, maintain ejectment against a third party, who rests his defence entirely on possession, and an outstanding title in the mortgagee.⁶ Moreover, being the substantial owner, he is entitled to sue for damages done the estate by a third person.⁷

35. In Massachusetts the English characteristics of a mortgage are retained. It confers upon the mortgagee a legal estate and the right of possession. "The first great object of a mortgage," says Chief Justice Shaw,⁸ "is in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first pur-

¹ *Blaney v. Bearce*, 2 Me. 132.

² Rev. Stat. 1871, c. 90, § 2.

³ *Wilkins v. French*, 20 Me. 111.

⁴ *Brown v. Stewart*, 1 Md. Ch. 87;

Leighton v. Preston, 9 Gill (Md.), 201;

Jamieson v. Bruce, 6 G. & J. (Md.) 72,

per *Archer, J.*; *McKim v. Mason*, 3 Md.

Ch. 186; *Sumwalt v. Tucker*, 34 Md. 89;

Annapolis, &c. R. Co. v. Gantt, 39 Md. 115.

⁵ *Wilhelm v. Lee*, 2 Md. Ch. 322; *Brown v. Stewart*, 1 Md. Ch. 87.

⁶ *Georges Creek Coal & Iron Co. v. Detmold*, 1 Md. 237.

⁷ *Annapolis, &c. R. Co. v. Gantt*, 39 Md. 115.

⁸ *Ewer v. Hobbs*, 5 Met. 1-3.

pose, that of securing the mortgagee. Hence it is, that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee; because that construction best secures him in his remedy and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in all other respects dealt with as the estate of the mortgagor. And all statutes upon the subject are to be so construed; and all rules of law, whether administered in law, or in equity, are to be so applied as to carry these objects into effect." And in another case the same eminent jurist says:¹ "Mortgaging is not such a conveying away of the estate as divests the entire title of the owner. It is a charge or incumbrance created out of that estate, and may amount to a small part only of its value. Although, as between mortgagor and mortgagee, it is a transmission of the fee, which gives the mortgagee a remedy in the form of a real action, and constitutes a legal seisin; yet to most other purposes a mortgage, before the entry of the mortgagee, is but a pledge and real lien, leaving the mortgagor to most purposes the owner."²

36. In Michigan no action of ejectment can be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage.³ The mortgagee has no legal title in the land mortgaged, but only a lien for the security of the mortgage debt.⁴

37. In Minnesota it is declared by statute that a mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of it without a foreclosure.⁵ Referring to this statute Chief Justice Emmett says:⁶

¹ Howard v. Robinson, 5 Cush. 119-123.

² See, also, Norcross v. Norcross, 105 Mass. 265; Bradley v. Fuller, 23 Pick. (Mass.) 1, 9; Hapgood v. Blood, 11 Gray (Mass.), 400; Sparhawk v. Bagg, 16 Ib. 583; Steel v. Steel, 4 Allen (Mass.), 417; Silloway v. Brown, 12 Ib. 30.

³ Comp. Laws of Mich. 1871, p. 1775.]

⁴ Caruthers v. Humphrey, 12 Mich. 270; Gorham v. Arnold, 22 Mich. 247.

⁵ Revision 1866, p. 540.

⁶ Adams v. Corrison, 7 Minn. 456; and see Donnelly v. Simonton, 7 Minn. 167; Berthold v. Holman, 12 Minn. 335; Berthold v. Fox, 13 Minn. 501.

“ This, it appears to me, deprives the mortgagee of the only material advantage which remained to him from being considered the owner of the fee ; and although, out of deference to the past, we may still regard him as the legal owner, he is such in theory only, having no right to interfere with the possession save by consent of the mortgagor. The effect of the change just referred to is to dissipate whatever of the title he may formerly have had, beyond that of a mere lien or security. And although the mortgagee may, by obtaining a strict foreclosure, eventually secure possession, and thus complete his title under the mortgage, yet, as the courts may, and in practice generally do, direct the property to be sold, even when a strict foreclosure is asked for, he is by no means certain of ever perfecting that title, which the mortgage purports to convey. And if the property, by direction of the court or otherwise, be sold to satisfy the mortgage, the purchaser, when he receives his deed, takes, not the title of the mortgagee, for that is extinguished by the application of the proceeds of the sale ; nor does he take simply the title of the mortgagor at the time of the sale, for that is incomplete ; but he takes the title which was in the mortgagor at the time the mortgage was given, which is equivalent to both.”

38. In Mississippi upon a breach of the condition of a mortgage the legal title becomes absolute in the mortgagee, who thereupon becomes entitled to the possession of the property as an incident to the title.¹ The Code now provides that before a sale under a mortgage, or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed, except as against the mortgagee and his assigns, or the trustee, after breach of the condition of the mortgage or deed.² The debt is considered as the principal, and the mortgage as an incident only. The mortgagee, notwithstanding the form of the conveyance, has but a security. The principles long established in chancery have, under the Code, become naturalized in the courts of common law, so that until foreclosure the mortgagee is regarded as having a chattel interest only. Even after the mortgagee has taken possession, the mortgaged estate is regarded as a pledge only. “ The relation of debtor and creditor exists,” says Chief

¹ *Hill v. Robertson*, 24 Miss. 368 ; *Harmon v. Short*, 8 Sm. & M. (Miss.) 433.

² Rev. Code, 1871, § 2295.

Justice Peyton,¹ “and the equity of redemption is unimpaired. Although the mortgagee has a chattel interest only, yet in order to render his pledge available, and give him the intended benefit of his security, it is considered as real property to enable him to maintain ejectment for the recovery of the possession of the land mortgaged; when contemplated in every other point of view, it is personal property.

As respects third persons, and the mortgagee also, until after forfeiture, the mortgagor is the owner of the legal estate, and the mortgagor has only a security for the debt. “The legal title,” says Chief Justice Simrall, in a recent case,² “may be asserted by the mortgagee, but only for the protection of his debt, and to make the security available for its payment.”

39. Missouri. — By a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee. The addition of a power to sell, without judicial proceedings to foreclose, cannot avoid the legal effect of the grant.³ The trustee, after dishonor of the notes secured, may enter, and without sale or foreclosure may maintain his possession for the use of the beneficiary, not only against all outsiders but against the maker of the deed himself, until the payment of the debt. It has long been established in this state that after condition broken the mortgagee may maintain ejectment.⁴

Where a mortgage debt is payable by instalments, the condition is broken by non-payment of any one of them, and the mortgagee may thereupon enter or bring ejectment, and it is no defence to such a suit that all the instalments are not due. The authorization contained in a mortgage, to sell only in event that “the said notes should not be well and truly paid,” should be construed to mean in case they should not be paid as they respectively become due. The mortgagee is not by such condition compelled to wait till the last note is dishonored before applying his remedy.⁵ But although a mortgage is a conveyance in fee upon condition, it is, even after the condition is broken and the legal title has passed

¹ In *Buckley v. Daley*, 45 Miss. 338, 227; *Woods v. Hilderbrand*, 46 Mo. 284; 345; and to same effect in *Carpenter v. Kennett v. Plummer*, 28 Mo. 142.

Bowen, 42 Miss. 28, 49. ⁴ *Wallop v. McKinney*, 10 Mo. 229;

² *Buck v. Payne*, 52 Miss. 271. *Sutton v. Mason*, 38 Mo. 120; *Reddick*

³ *Johnson et al. v. Houston*, 47 Mo. *v. Gressman*, 49 Mo. 389.

⁵ *Reddick v. Gressman*, 49 Mo. 389.

to the mortgagee, merely a security for the debt, and is extinguished, and the title revested, whenever the debt is paid.¹

40. Nebraska. — The doctrine that the mortgagor is not seised of the freehold, either at law or in equity, either before or after condition broken, is established.² It is provided by statute that the mortgagor may retain possession until foreclosure, unless otherwise stipulated by the parties.³

A deed of trust to secure the payment of a debt being in effect a mortgage is held, in accordance with the general rule that a mortgage does not pass the legal title, not to vest a legal estate in the trustee.⁴

41. In Nevada the court seem inclined to hold that the title does not pass from the mortgagor before breach of the condition.⁵ It is provided by statute that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the land, without a foreclosure and sale.⁶

42. New Hampshire. — The seisin, or possession, as well as the title, passes directly to the mortgagee unless he is restrained by the provisions of the deed ; and upon a breach of the condition he is in any case entitled to the possession. The mortgagor retains, as against the mortgagee, nothing more than a mere power to regain the fee upon the performance of a condition, and this condition is strictly a condition precedent.⁷ As against all other persons the mortgagor is regarded as the owner, and may maintain a real action to recover the possession. The mortgagor has the legal title merely so far as is necessary, in order to enable him to obtain the full benefit of the security, and prevent any violation of his rights under the mortgage.⁸ Whenever the mortgagee

¹ *Pease v. Pilot Knob Iron Co.* 49 Mo. 124.

² *Kyger v. Ryley*, 2 Neb. 20, 28.

³ Gen. Stat. 1873, ch. 61, § 55.

⁴ *Webb v. Hoselton*, 4 Neb. 308 ; *Kyger v. Ryley*, 2 Neb. 20, 28.

⁵ *Whitmore v. Shiverick*, 3 Nev. 288 ; *Hyman v. Kelly*, 1 Nev. 179.

⁶ 1 Comp. Laws, § 1323.

⁷ *Brown v. Cram*, 1 N. H. 169 ; *Southern v. Mendum*, 5 N. H. 420 ; *McMurphy v. Minot*, 4 N. H. 255 ; *Tripe v. Marcy*, 39 N. H. 439 ; *Hobart v. Sanborn*, 13 N. H. 226.

⁸ *Ellison v. Daniels*, 11 N. H. 274 ; *Parish v. Gilmanton*, 11 N. H. 293, 298 ; *Whittemore v. Gibbs*, 24 N. H. 484 ; *Great Falls Co. v. Worster*, 15 N. H. 412, 444.

is entitled to possession he may doubtless treat the possession of the mortgagor as a disseisin, at his election, and may at once maintain a writ of entry for the recovery of the possession, without any notice to quit; but until such election the possession of the mortgagor cannot be regarded as a disseisin, but as permissive, and bearing in many respects a close analogy to a strict tenancy at will or at sufferance. Until this power of election is exercised, the mortgagor is in with the privity and assent of the mortgagee, and in subordination to his title; and it is therefore held, that upon the ground of such presumed assent, the mortgagor is not liable to the mortgagee for the rents and profits while so in possession.¹

43. In New Jersey the nature of the mortgage as a conveyance of an estate to the mortgagee, in fee simple, subject to be defeated by the performance of the condition, remains as it was at common law, with the modification that the mortgagee cannot enter immediately as at common law, but only upon breach of the condition.² A mortgage is merely auxiliary to the debt, and the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, even after the day of payment named in the condition. In fact, the latter conclusion will necessarily follow whenever the mortgage is regarded, not as a common law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this state, this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt.³

44. New York. — Following the views of Lord Mansfield, the courts of New York from the first regarded a mortgage as merely a security of a personal nature upon the land of the mortgagor, who retained the legal title, at least until possession taken.⁴

¹ *Chellis v. Stearns*, 22 N. H. 196, 215; whose dissenting opinion was adopted in *Furbush v. Goodwin*, 29 N. H. 321, 332.

² *Sanderson v. Price*, 1 Zab. (N. J.) 646, note; *Shields v. Lozear*, 34 N. J. L. 496, per Depue, J.

³ *Shields v. Lozear*, 34 N. J. L. 496, per Depue, J., citing *Osborne v. Tunis*, 1 Dutch. (N. J.) 651; *Montgomery v. Brucere*, 1 South. (N. J.) 279, per Southard, J.,

⁴ *Waters v. Stewart*, 1 Caines Cas. 47, per Kent, J.; *Jackson v. Willard*, 4 Johns. 42; *Runyan v. Mersereau*, 11 Ib. 534; *Packer v. Rochester, &c.* R. Co. 17 N. Y. 283; *Power v. Lester*, 23 N. Y. 527; *Merritt v. Bartholick*, 36 N. Y. 44; *Trimm v. Marsh*, 54 N. Y. 599; *Bryan v. Butts*, 27

But prior to the Revised Statutes of 1828, the title of the mortgagee must in fact have been something not very different from the legal estate, for unless prevented by the terms of the mortgage he had the right to recover possession of the property by ejectment, and after default he could so recover it at any time. This right was taken away then, and so far as possession before foreclosure is concerned, his only right is to retain possession when he has once obtained it by the mortgagor's consent.¹ It is said that he does not, however, acquire any estate from his possession.²

45. In North Carolina upon the execution of a mortgage, the mortgagor becomes the equitable and the mortgagee the legal owner, and this relative situation remains until the mortgage is redeemed or foreclosed. Until the day of redemption is passed the mortgagor has no special equity, but he may pay the money according to the proviso, and avoid the conveyance at law, and this privilege is termed his legal right of redemption.³

After the special day of payment has passed, the mortgagor still has an equity of redemption, until there is a foreclosure, and this right is regarded as a continuance of the old estate, and so long as he is permitted to remain in possession, he is considered to hold in respect to his ownership, and is not accountable for the rents and profits of the mortgaged lands.

If the mortgagor be allowed to remain in possession for a long period by the acquiescence and implied approval of the mortgagee, he is not a trespasser; and although he may not be a tenant, he is a permissive occupant, and as such is entitled to a reasonable demand to terminate the implied license before an action can be brought to recover possession.⁴

46. In Ohio a mortgagee is regarded as holding the legal title

Barb. (N. Y.) 503; *Calkins v. Calkins*, 3 Ib. 305; *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *Curtis v. Bronson*, 19 Ib. 325; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; S. C. 2 Paige, 68; *Bell v. Mayor of New York*, 10 Paige (N. Y.), 49.

¹ 2 R. S. 312, § 57; *Waring v. Smyth*, 2 Barb. (N. Y.) Ch. 119, 135.

² *Parker v. Rochester & Syracuse R. Co.* 17 N. Y. 283, 295.

³ *Hemphill v. Ross*, 66 N. C. 477; and see *Ellis v. Hussey*, 66 N. C. 501. A mortgagor in possession is a freeholder within the meaning of an act relating to jurors. He has not any legal estate, but the act does not provide that he shall be a legal freeholder; that he is an equitable freeholder is sufficient. *State v. Ragland*, 75 N. C. 12.

⁴ *Hemphill v. Ross*, *supra*.

to the estate during the continuance of the mortgage, but whether in a court of law or of equity he is permitted to use this legal title only for the purpose of making effectual the security.¹ The legal title as between the parties is held to be in the mortgagee. As to all the world beside, it is in the mortgagor. After condition broken, the mortgagee may recover possession by an action of ejectment.²

47. By statute in Oregon a mortgagor cannot against his will be divested of possession of the mortgaged premises, even upon default, without a foreclosure and sale.³

But if a mortgagor choose, he can give possession to the mortgagee, and when this is done, and the duration of the mortgagee's possession is not limited by agreement, he may retain possession until the debt is paid; and until it be paid the mortgagor cannot recover possession by an action of ejectment.⁴

48. In Pennsylvania a mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may enter at pleasure, and take actual possession. His estate is conditional, and ceases upon payment of the debt; but until the condition is performed, both his title and his right of possession are as substantial and real as though they were absolute. "Thus we perceive," says Chief Justice Agnew in a recent case,⁵ "an interest, or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere lien or potentiality, to follow it by legal process and condemn it for payment. The land passes to the mortgagee by the act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate, and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited. It is true, if the mortgagee be held out, he may have to resort to ejectment, but this is to avoid a conflict, and the statutory penal-

¹ Harkrader v. Leiby, 4 Ohio St. 602.
 "But it is incorrect to say that a mortgage does no more than to create a mere lien upon the property." Per Ranney, J.

² Allen v. Everly, 24 Ohio St. 97, 114; Rands v. Kendall, 15 Ohio, 671.

³ Civil Code, § 323; Besser v. Hawthorne, 3 Oreg. 129.

⁴ Roberts v. Sutherlin, 4 Oreg. 219.

⁵ Tryon v. Munson, 77 Pa. St. 250; and see numerous cases in that state cited by the learned judge in support, and in illustration, of this doctrine.

ties for forcible entry, for otherwise he may take peaceable possession, and is not liable as a trespasser."

The law is, that as between the parties the mortgage transmits the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. As to all others the mortgage is a lien merely and not an estate. This is the view taken both in courts of equity and courts of law.¹

It is well settled that a mortgagee or his assignee may maintain ejectment and recover possession of the mortgaged property before the condition is broken, unless there be a stipulation in the instrument to the contrary.²

49. Rhode Island. — The common law doctrine of the nature of mortgages prevails in this state. The mortgagee may recover possession by suit at law. Upon any breach of the condition, such as the non-payment of interest, the mortgagee may maintain ejectment, though the principal sum be not due.³ "Formerly," says Chief Justice Ames,⁴ "the right of the mortgagor was, upon breach of the condition of the mortgage, wholly gone at law; and his equity to redeem was recognized only by the tribunal able to enforce such a right. It is true that in modern times the courts of law have, for many purposes, treated the mortgagor in possession as the real owner of the estate, looking upon a mortgage in the same light that a court of equity does, as a mere security for the mortgage debt; but we can see no reason why such courts should recognize in a mortgagor in possession under a forfeited mortgage greater rights over the mortgaged estate than courts of equity do." The mortgagee's remedy for waste done by the mortgagor, when a writ of *estrepement* will not lie, is usually to be sought in equity; but it is a wrong at law also, and therefore a mortgagee may maintain against a mortgagor in possession an action of *replevin* for wood and timber cut on the land in waste of the same.⁵

50. By statute in South Carolina it is provided that the mortgagee shall not be entitled to maintain any possessory action for

¹ *Brobst v. Brock*, 10 Wall. 519.

⁴ *Waterman v. Matteson*, 4 R. I. 539,

² *Youngman v. Elmira, &c. Railroad* 545.

Co. 65 Penn. St. 278, 285, and cases cited.

⁵ *Waterman v. Matteson*, *supra*.

³ *Carpenter v. Carpenter*, 6 R. I. 542.

the mortgaged estate even after the mortgage is due, but that the mortgagor shall still be deemed the owner of the land and the mortgagee as owner of the money lent or due.¹

51. In Tennessee the legal title vests in the mortgagee, who is entitled to immediate possession, unless the mortgage otherwise provides. He may recover possession without first giving notice to quit.²

52. Texas.—A mortgage is but a security, and the title remains in the mortgagor, subject to be divested by foreclosure. In this respect a deed of trust is held not to differ from a mortgage; the legal title and right of possession remain with the grantor.³

53. Utah Territory.—It is provided that a mortgage shall not be deemed a conveyance, so as to entitle the mortgagee to recover possession without foreclosure.⁴

54. In Vermont the mortgagor's right of possession is by statute continued as against the mortgagee until condition broken, unless otherwise stipulated in the mortgage.⁵ Upon the happening of that event the interest of the mortgagor becomes absolutely vested in the mortgagee, and he has a right to the immediate possession of the estate.⁶ He may assert this right by entering peaceably by his own act, or may bring an action of ejectment without previous notice to quit. Until he asserts this right, the mortgagor in possession is regarded as the owner of the land, and may use and occupy it without accounting to the mortgagee.⁷

55. Virginia.—At law, the mortgagee has the legal estate, and the immediate right of possession, unless there be some stipulation in the mortgage deed to the contrary. Upon a breach of the condition, the mortgagee may enter, or recover possession by

¹ R. S. 1873, p. 536; *Thayer v. Cramer*,

¹ *McCord* (S. C.) Ch. 395; *Nixon v. Bynum*, 1 *Bailey* (S. C.), 148; *Hughes v. Edwards*, 9 *Wheat.* 489.

² *Henshaw v. Wells*, 9 *Humph.* (Tenn.) 568; *Vance v. Johnson*, 10 *Ib.* 214.

³ *Wright v. Henderson*, 12 *Tex.* 43; *Walker v. Johnson*, 37 *Ib.* 127, 129; *Mann v. Falcon*, 25 *Tex.* 271.

⁴ Civil Practice Act, 1870, § 260.

⁵ Gen. Stat. 1870, c. 40, § 12.

⁶ *Hagar v. Brainerd*, 44 *Vt.* 294; *Lull v. Matthews*, 19 *Vt.* 322.

⁷ *Hooper v. Wilson*, 12 *Vt.* 695; *Wilson v. Hooper*, 13 *Vt.* 653; *Walker v. King*, 44 *Vt.* 601.

action, without previous notice. He is then, to all intents and purposes, the legal owner of the land, and vested with full legal title. The mortgagor is then regarded as a tenant at sufferance, and is not entitled to the emblements. In equity, however, the mortgagor may redeem, and the mortgagee in possession is regarded as merely a trustee of the property, with liability to account.¹ Trust deeds are used almost exclusively in place of mortgages, and the legal title vests in the grantee in such deeds.

56. West Virginia. — Trust deeds are used in place of mortgages. The law in regard to mortgages is that which prevailed in Virginia before the separation.

57. In Wisconsin, the fee of the premises does not vest in the mortgagee, except upon foreclosure sale.² It is provided by statute that 'no action shall be maintained by the mortgagee for the recovery of possession of the mortgaged premises until the equity of redemption shall have expired.'³ The statute in effect preserves the fee in the mortgagor until foreclosure,⁴ when it vests in the purchaser at the sale. When, however, the mortgagee has, after default, gone into peaceable possession, he cannot be ejected by the mortgagor while the mortgage remains unsatisfied. The only remedy of the mortgagor is by bill to redeem, upon which he must pay whatever is due upon the mortgage debt.⁵

58. As a summary of this examination it will be found that in Alabama, Arkansas, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia, the courts have adhered to the doctrines of the common law as regards the nature of the mortgage interest and the respective rights of the parties. They regard the mortgage deed as passing at once the legal title to the mortgagee, subject to defeasance, as a condition subsequent which divests or defeats the estate on performance of it. The right of possession

¹ 2 Minor's Institutes, 300-330; *Faulkner v. Brockenbrough*, 4 Rand. (Va.) 245.

² *Wood v. Trask*, 7 Wis. 566.

³ Rev. Stat. 1871, p. 1671.

⁴ *Wood v. Trask*, *supra*.

⁵ *Hennesy v. Farrell*, 20 Wis. 42; *Tallman v. Ely*, 6 Wis. 244; *Gillett v. Eaton*, 6 Wis. 30; and see *Fladland v. Delaplaine*, 19 Wis. 459; *Avery v. Judd*, 21 Wis. 262.

follows the title so that the mortgagee may enter into possession of the mortgaged property immediately unless restrained by express provision, or necessary implication of the mortgage; and in any case upon breach of the condition he becomes entitled to the possession and may recover it by action.

In Delaware, Mississippi, and Missouri the common law doctrine is so far modified, that until a breach of the condition and possession taken the mortgagor is regarded as the owner of the legal estate, not only as against third persons, but as against the mortgagee himself. But upon a forfeiture and entry of the mortgagee, he is regarded as having the legal title for the purpose of enforcing his demand and obtaining satisfaction out of the property.

In other states the common law doctrine upon this subject has been wholly abrogated by statute, and both at law and in equity, and both before and after a breach of the condition, a mortgage is regarded as merely a lien upon the property. It passes no title or estate in it to the mortgagee, and gives him no right of possession before foreclosure.

This is the doctrine of mortgages in California, Dakota Territory, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, Oregon, South Carolina, Texas, Utah Territory, and Wisconsin. In Iowa, Kansas, and Nevada the statutes imply that the parties may by express stipulation give the right of possession to the mortgagee.

59. Grouping the states geographically it will be noticed that the English doctrine of the nature of mortgages, with slight modifications, prevails east of the Mississippi River everywhere, excepting New York alone in the north; a group of three states, Indiana, Michigan, and Wisconsin, in the west; and a group of three states, South Carolina, Georgia, and Florida, in the south; while west of the Mississippi, excepting only the states of Missouri and Arkansas, the doctrine everywhere prevails that a mortgage passes no estate or right of possession. This change from the common law rule may be traced to two sources: to the views of the early jurists of New York, who adopted and carried to logical conclusions the opinions of Lord Mansfield; and to the civil law¹

¹ "In the Roman law there were two sorts of transfers of property, as security for debts; namely the *pignus* and the *hypotheca*. The *pignus*, or pledge, was when

established in Louisiana, under which a mortgage is merely a pledge, giving no right of possession. The influence of the civil law is particularly seen in the codes of the states and territories beyond the Mississippi. As to the nature of a mortgage, the civil law doctrine, and what may be called the equitable doctrine adopted in New York and the other states mentioned, are practically and essentially the same.¹

anything was pledged as a security for money lent and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. The *hypotheca* was where the thing pledged was not delivered to the creditor, but remained in the possession of the debtor." 2 Story Eq. Jur. § 1005.

"In the Roman law, it seems that the word *pignus* was often used indiscriminately to describe both species of securities, whether applied to movables or immovables, . . . so that it answered very nearly to the corresponding term *pledge* in the common law, which, although sometimes used in a general sense to include mortgages of land, is, in the stricter sense, confined to the pawn and deposit of personal property. In the Roman law, however, there was generally no substantial difference in the nature and extent of the rights and remedies of the parties, be-

tween movables and immovables, whether pledged or hypothecated." 2 Story Eq. Jur. § 1006.

¹ Mortgages which do not pass any legal interest or title to the mortgagee are denominated equitable mortgages. Such mortgages may arise either from the fact that the mortgagor has no legal title to the property, and therefore can convey none, or from the fact that the instrument creating the mortgage does not make a complete legal transfer of the property.

Of the former class are mortgages of an equity of redemption executed in a formal manner. The legal estate, according to the English doctrine of mortgages, which also prevails in a large portion of the United States, has already passed to the first mortgagee, so that the mortgagor can only transfer an equitable interest to a subsequent mortgagee.

CHAPTER II.

FORM AND REQUISITES OF A MORTGAGE.

1. *The Form Generally.*

60. No particular form is necessary to constitute a mortgage.¹ It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and upon the satisfaction of which the lien is to be discharged, and the property upon which it is to take effect. Fulfilling these conditions, it is immaterial that the mortgage should be embraced in one instrument. As will be elsewhere noticed, a mortgage is frequently made by an absolute deed with a separate defeasance executed by the grantee; and an absolute deed with a defeasance resting in parol may be a mortgage also. In this chapter, however, it is proposed to treat of the form and requisites of a formal legal mortgage, or deed of trust.

The term "mortgage" has a technical signification at law, and is descriptive of an instrument having all the requisites necessary to establish it in a court of law, as distinguished from that which may be so regarded in a court of equity.² A mortgage which only a court of equity will recognize is properly designated an "equitable mortgage."

A formal mortgage differs from a warranty deed in a condition added, that if the grantor pay a certain sum of money, or perform other obligations named, then it shall be void.³ Other things be-

¹ Georgia Code, 1873, § 1955; Burnside v. Terry, 45 Geo. 621; De Leon v. Higuera, 15 Cal. 483; Woodworth v. Guzman, 1 Cal. 203; Baldwin v. Jenkins, 23 Miss. 206; Mason v. Moody, 26 Miss. 184.

² Walton v. Cody, 1 Wis. 420.

³ The following is a common form of a power of sale mortgage used in MASSACHUSETTS and other NEW ENGLAND states:—

KNOW ALL MEN BY THESE PRESENTS, that _____, in consideration of _____, paid by _____, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said _____ [here follows description]. To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said _____ and _____ heirs and assigns, to their own use and behoof forever.

sides the payment of the principal sum of money are usually made part of the condition, as for instance the payment of interest, the

And hereby for and heirs, executors, and administrators, covenant with the grantee and heirs and assigns that lawfully seised in fee simple of the granted premises, that they are free from all incumbrances, that have good right to sell and convey the same as aforesaid; and that will, and heirs, executors, and administrators, shall warrant and defend the same to the grantee and heirs and assigns forever against the lawful claims and demands of all persons

Provided, nevertheless, that if or heirs, executors, administrators, or assigns, shall pay unto the grantee, or executors, administrators, or assigns the sum of in years from this date, with interest semi-annually at the rate of per cent. per annum, and until such payment shall pay all taxes and assessments on the granted premises; shall keep the buildings thereon insured against fire in a sum not less than dollars, for the benefit of the grantee, and executors, administrators, and assigns, at such insurance office as they shall approve, and shall not commit or suffer any strip or waste of the granted premises, or any breach of any covenant herein contained, then this deed, as also note of even date herewith, signed by, whereby promise to pay to the grantee or order the said sum and interest at the times aforesaid, shall be void.

But upon any default in the performance or observance of the foregoing condition, the grantee, or executors, administrators, or assigns, may sell the granted premises, or such portion thereof as may remain subject to this mortgage in case of any partial release hereof, together with all improvements that may be thereon, at public auction in said, first publishing a notice of the time and place of sale once each week for three suc-

cessive weeks in one or more newspapers published in said, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar and all persons claiming under from all right and interest in the granted premises, whether at law or in equity. And out of the money arising from such sale the grantee or representatives shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable, including all costs, charges, and expenses incurred or sustained by reason of any failure or default on the part of or of representatives to perform and fulfil the condition of this deed, rendering the surplus, if any, to or heirs or assigns.

And it is agreed that the grantee, or executors, administrators, or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the purchase money; and that, until default in the performance of the condition of this deed, and heirs and assigns may hold and enjoy the granted premises and receive the rents and profits thereof.

And for the consideration aforesaid do hereby release unto the grantee and heirs and assigns all right of or to both dower and homestead in the granted premises.

In witness whereof the said hereunto set hand and seal this day of in the year one thousand eight hundred and seventy-

Signed, sealed, and delivered in presence of

_____ } _____ (Seal)
 _____ } _____ (Seal)
 _____ }

taxes upon the premises, and insurance upon any buildings there may be upon the land, together with a covenant against making or suffering waste.

The mortgage in some states usually contains also a power authorizing the mortgagee to sell upon the happening of any breach of the condition; but this is not an essential requisite of a mortgage, and will be treated of elsewhere.

61. Statutory forms.—The form of the granting part of the deed as well as the condition differs much in different parts of the country. In some states statutes have been enacted by which deeds and mortgages are reduced to the shortest possible forms; and statutory forms are given in some states, which are declared to be good and effectual.¹ All that is requisite to a good deed or mortgage

COMMONWEALTH OF MASSACHUSETTS.

ss. 187. Then personally appeared the above named , and acknowledged the foregoing instrument to be free act and deed, before me

Justice of the Peace.

Form of mortgage in use in CALIFORNIA:—

This indenture, made the day of , in the year of our Lord one thousand eight hundred and seventy- , between , party of the first part, and , the party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of dollars, of the United States of America, to him in hand paid, does by these presents grant, bargain, sell, and convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land situate in the , County of , State of , bounded and described as follows: [here give description of property], together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining. This conveyance is intended as a mortgage to secure the payment of

, and all these presents shall be void if such payment be made (according to the tenor and effect thereof). But in case default be made in the payment of the principal or interest, as provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and, out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale, and per cent. for attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Signed, sealed, and delivered in the presence of

_____) _____ (Seal)
_____) _____ (Seal)
_____)

¹ The following statutory forms show how brief and simple a form contains all the requisites of a mortgage. In these

may be expressed in a very few words. As remarked by Lord Coke, if a deed of feoffment be without *premises, habendum, te-*

same states more elaborate forms are in general use.

In INDIANA a mortgage may be made in substance as follows: "A. B. mortgages and warrants to C. D. [here describe the premises], to secure the repayment of" [here recite the sum for which the mortgage is granted, or the notes or other evidences of debt, or a description thereof sought to be secured, also the date of repayment].

Such a mortgage being dated and duly signed, sealed, and acknowledged by the grantor is deemed and held to be a good and sufficient mortgage to the grantee, his heirs, assigns, executors, and administrators, with warranty from the grantor and his legal representatives of perfect title in the grantor, and against all previous incumbrances. If in the above form the words, *and warrant*, be omitted, the mortgage is good, but without warranty. Gavin & Hord's Stat. of Ind 260.

In IOWA it is provided that the following or other equivalent form is sufficient for a mortgage. Code 1873, p. 363:—

"For the consideration of dollars I hereby convey to A. B. the following tract of land [describing it], to be void upon conditions that I pay," &c.

MISSOURI, Wagner's Stats. (1870) p. 1416: "Know all men by these presents, that , of the County of , in the State of Missouri, have this day, for and in consideration of the sum of dollars, to in hand paid, by , of the County of , in the State of , granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said , the following described tracts or parcels of land, situate in the County of , in the State of Missouri; that is to say [here describe the land]. To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging, or in anywise appertaining unto the said , his heirs and assigns, forever, upon the express

condition: Whereas the said , on the day of , 18 (or has this day), made, executed, and delivered to the said , his certain promissory note, in the words and figures following, to wit: [here copy the note;] now if the said , his executor or administrator, shall pay the sum of money specified in said note, and all interest that may be due thereon, according to the tenor of said note, then this conveyance shall be void; otherwise it shall remain in full force and virtue in law.

"And the said , or his executor or administrator, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at , in the County of , for cash in hand, first giving days' public notice of the time, terms, and place of sale, and the property to be sold, by advertisements (in some newspaper printed or circulated in the county where the premises are situate, or any other mode of advertisement agreed upon by the parties); and upon such sale, and the payment of the purchase money, shall execute and deliver a conveyance of the property so sold to the purchaser thereof; and any statement of facts, or recital by the said , in such conveyance in relation to the advertisement, sale, receipt of the purchase money, or execution of such conveyance shall be received as *prima facie* evidence of the truth thereof. And the said shall, with the proceeds of the sale aforesaid, pay, first, the expenses of this trust, and next, whatever may be in arrear and unpaid on said note, whether for principal or interest; and the balance (if any) shall be paid over to the said or his legal representatives.

"In witness whereof," &c.

In CALIFORNIA, by Civil Code, 1872, § 2948, a mortgage of real property may be made in substantially the following form:—

nendum, reddendum, clause of warranty, &c., it is still a good deed.
 “For if a man by deed give land to another and to his heirs with-

“This mortgage, made the day of , in the year , by A. B., of , mortgagor, to C. D., of , mortgagee, witnesseth:

“That the mortgagor mortgages to the mortgagee [here describe the property], as security for the payment to him of dollars, on (or before) the day of , in the year , with interest thereon (or as security for the payment of an obligation, describing it, &c.).

“A. B.”

In MARYLAND, the following form of mortgage is given, Code, 1860, p. 143:—

“This mortgage, made this day of , by me , witnesseth, that in consideration of the sum of dollars now due from me, the said , to , I, the said , do grant unto the said [here describe the property]. Provided, that if I, the said , shall pay on or before the day of to the said , the sum of dollars, with the interest thereon from , then this mortgage shall be void,

“Witness my hand and seal. (Seal.)”

In TENNESSEE the statute form of mortgage is as follows, Code, 1858, § 2013:—

“I hereby convey to A. B. the following land [describing it], to be void upon condition that I pay,” &c.

For a deed of trust:—

“For the purpose of securing to A. B. a note of this date, due at twelve months, with interest from date (or as the case may be), I hereby convey to C. D. in trust, the following property [describing it]. And if the note is not paid at maturity, I hereby authorize C. D. to sell the property herein conveyed (stating the manner, place of sale, notice, &c.), to execute a deed to the purchaser, to pay off the amount herein secured, with interest and costs, and to hold the remainder subject to my order.”

In DAKOTA TERRITORY the forms of

mortgages given by statute are as follows:—

“This mortgage, made the day of , in the year , between A. B., of , of the first part, and C. D., of , of the second part, witnesseth:

I. That in consideration of dollars, now received, the party of the first part hereby mortgages to the party of the second part [here describe the property], as security for the payment to him of dollars, on the day of , 18 , with interest thereon (or as security for the payment of a bond, describing it).

(If a power of sale is to be given add): II. That in case of the non-payment of the principal sum, or of any part of the interest thereon, when due, the party of the second part may enter upon and sell the property above described, in the manner prescribed by the Civil Code, and the Code of Civil Procedure of this territory, and apply the proceeds of such sale to the satisfaction of the amount due under this mortgage, and the expenses of sale; and the residue to be forthwith paid to the party of the first part.

(If the interest clause is to be inserted, add): III. That if the interest upon the principal sum mentioned is not fully paid as it falls due, the entire principal shall become immediately due and payable, at the option of the party of the second part.

(If the insurance clause is to be inserted, add): IV. That the party of the first part shall, at his own expense, keep the buildings on the said property insured against fire, in a reputable insurance office, for the benefit of the party of the second part, to the extent of dollars, until this mortgage is paid or otherwise extinguished.

“Witness the hand and seal of the party of the first part. A. B. (Seal)

“Scaled and delivered in presence of
 “E. F.”

out more saying, this is good, if he put his seal to the deed, deliver it, and make livery accordingly." Chancellor Kent gives a very brief form of a deed, but he adds: "But persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests, to make 'assurance double sure,' that generally, in important cases, the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance for a conveyance surrounded by the usual outworks, and securing respect and checking attacks by the formality of its manner, the prolixity of its provisions, and the usual redundancy of its language."¹

By statute the legal tenor and effect of the different covenants may be, and in some states are, obtained simply by naming them without repeating the covenants themselves. In like manner the full effect of a power of sale may be had by simple reference in the mortgage to a statutory power,² instead of cumbering the record with the elaborate powers now in use. Attempts by legislation to bring about simplicity and brevity in legal forms have not always been successful; but much has been accomplished in this direction in some of the American States, making a practical return through this means to the simplicity of the ancient Saxons, who, "in their deeds observed no set form, but used honest and perspicuous words to express the things intended with all brevity, yet not wanting the essential parts of the deed; as the names of the donor and donee; the consideration; the certainty of the thing given; the limitation of the estate; the reservation, and the names of the witnesses."³

62. A deed of trust to secure a debt is in legal effect a mortgage.⁴ It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but

¹ 4 Kent Com. 461. He says:—

"I apprehend that a deed would be perfectly competent, in any part of the United States, to convey the fee, if it was to be to the following effect: I, A. B., in consideration of one dollar to me paid by C. D., do bargain and sell (or, in New York, grant), to C. D. and his heirs (in New York, Virginia, &c., the words, and his heirs, may be omitted) the lot of land [de-

scribe it]. Witness my hand and seal," &c.

² See chapters xxxix, xl.

³ Sir Henry Spellman's Works, by Bishop Gibson, p. 234.

⁴ *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Woodruff v. Robb*, 19 Ohio, 212; *Sargent v. Howe*, 21 Ill. 148; *Newman v. Samuels*, 17 Iowa, 528, 535; *Lawrence v. Farmers', &c. Trust Co.* 13 N. Y. 200; *Palmer v. Gurnsey*, 7 Wend. (N. Y.) 248.

if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, and pay over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage.¹ Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title to the grantee just as a mortgage does, except in those states where the natural effect of a conveyance is controlled by statute; and in those states, as a general rule, it is considered merely as a security, and not a conveyance, just as a mortgage is considered.² Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is in the other. The only important difference between them is, that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit.

In Wisconsin, however, in consequence of a statute abolishing uses and trusts, except for certain purposes, a deed to a trustee conditioned that if the grantor does not pay a debt due from him to a third party, then the trustee shall advertise and sell the lands, pay the debt, and return the surplus money to the grantor, does not constitute a mortgage. The trustee is the mere agent of both parties, and such a trust being prohibited by the statute, the legal title remains in the grantor.³

Again, there is a well settled distinction between a deed of trust and a deed of trust in the nature of a mortgage; the one being for the trust purposes unconditional and indefeasible, while the other is conditional and defeasible, in the same way that a mortgage is.⁴ The term deed of trust, as used in this treatise, has reference always to a conveyance in the nature of a mortgage. "A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts; while the former is a convey-

¹ *Eaton v. Whitney, supra*; *Newman v. Samuels, supra*.

² *Marvin v. Titsworth*, 10 Wis. 320.

³ *Hoffman v. Mackall*, 5 Ohio St. 124.

⁴ *Lenox v. Reed*, 12 Kans. 223, 227.

ance in trust for the purpose of securing a debt, subject to a condition of defeasance.”¹

2. *The Formal Parts of the Deed.*

63. Parties described. — It is important that the names of the parties to a deed should be given accurately and fully. Persons accustomed chiefly to commercial transactions and forms sometimes neglect to observe this requirement, and use the initial only of the Christian name, and thereby needlessly introduce a new element of confusion and uncertainty into the record title. Parol evidence is admissible to show who was really intended as the grantee in a deed when the name is claimed to be erroneous, and there is a person of the name used in the deed.² It is not absolutely essential to the validity of a mortgage that a mortgagee be described by name, if there be such other description as will distinguish the person intended from all others; as, for instance, when the mortgage is made to the heirs at law of a person named who has deceased; ³ but it would be void if made to the heirs of a person living, because it is then uncertain who are intended to have the benefit of the mortgage.⁴

But a mortgage “to the trustees” of an unincorporated association or society is good, although the trustees be not named.⁵ It is sufficient if they are so clearly described as to distinguish them from all others, so that there can be no uncertainty in the grant.

A mortgage to a corporation by a name to which it was contemplated at the time to change the existing name of the company, is valid, if made to the corporation intended and it was then existing. In a proceeding upon the mortgage it should be averred that the mortgage was made to the company by the name used, it being then known by that name, as well as by the name it was legally entitled to.⁶

¹ Per Bartley, J., in *Hoffman v. Mackall*, *supra*.

² Thus a deed to “Hiram Gowing,” was shown in this way to be intended for “Hiram G. Gowing,” and not for his son, whose name was “Hiram Gowing.” *Peabody v. Brown*, 10 Gray (Mass.), 45; and see *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 530.

As to the name of the grantor or mort-

gagor, his signature fixes the actual identity of the person.

³ *Shaw v. Lond*, 12 Mass. 447; and see *Thomas v. Marshfield*, 10 Pick. (Mass.) 364, 367.

⁴ *Hall v. Leonard*, 1 Pick. (Mass.) 27, 30.

⁵ *Lawrence v. Fletcher*, 8 Met. (Mass.) 153, 163.

⁶ *City Bank of Kenosha v. McClellan*, 21 Wis. 112.

The designation of "junior" or "second" is no part of a man's name, and although convenient and desirable for the purpose of distinguishing the party from another person of the same name, it is not essential, and the person intended may be shown in some other way.¹ The description of a person by his occupation is an addition of the same character, though of less importance, because the terms used to describe the occupation are so general that they serve but little practical purpose in identifying the person.

When a party to the mortgage is a woman, it is important, if she be married, to give her husband's name, and if she be not married, to state that she is a "single woman" or a "widow."

It is usual and desirable to state the place of residence of the parties by naming not merely the town or city of such residence, but the county and state as well.

64. Generally the consideration named in a mortgage is the actual amount of the debt secured by it. But it is not essential that this should be so. A nominal consideration named is sufficient, and in fact it is not essential that any consideration at all should be expressed. The real consideration is the debt or obligation which the mortgage is given to secure, and upon that depends the validity of the mortgage, so far as the consideration is concerned. The seal implies a consideration.

The amount of the debt secured is in no way fixed or controlled by the nominal consideration. The condition of the mortgage describes the debt and fixes the amount of it either specifically or in general terms.² A mortgage to indemnify against a liability, or to secure future advances, is generally of the latter description, but even in these cases the nominal consideration is immaterial.

65. An accurate description of the premises is of great importance as affecting the value of the security, and oftentimes affecting as well the interest of the mortgagor, and of persons holding title under him.

But a description, however general and indefinite it may be, if by extrinsic evidence it can be made practically certain what property it was intended to cover, will be sufficient to sustain the lien.³

¹ *Cobb v. Lucas*, 15 Pick. (Mass.) 7; *Kincaid v. Howe*, 10 Mass. 203.

² *Miller v. Lockwood*, 32 N. Y. 293.

³ *Tucker v. Field*, 51 Miss. 191; and see *Baker v. Bank of La.* 2 La. Ann. 371;

Whitney v. Buckman, 13 Cal. 536; De

Thus a mortgage of all the lots the mortgagor then owned in a certain town, whether he had the legal or equitable title thereto, conveys all the lots which can be identified as belonging to him by either title.¹ But a mortgage of all the lands the mortgagor owns in a certain town does not include lands held by him in mortgage, though by absolute deed with a separate defeasance not recorded.²

A mortgage "of all my estate," or "of all my lands wherever situated," or "of all my property," is not invalid by reason of the generality of the description.³

When the objection is merely to the indefiniteness of description, it does not lie with the mortgagor to say that he conveyed the property by a description so loose or indefinite that no title could pass upon a foreclosure sale of the property. If nothing passes, it is the misfortune of the mortgagee, but the mortgagor is not hurt; if anything does pass, the mortgagee is entitled to the benefit of the mortgage as it stands.⁴ When, however, the description is such that property may pass or be sold under the mortgage which the mortgagor did not include, or intend to include, it is proper that he should ask to have it reformed.

The mortgagor cannot object to the enforcement of the mortgage against him personally, on the ground that the description of the property was so indefinite as not to pass any title.⁵

66. What uncertainty in description will invalidate. — The description may be so uncertain that no title will vest in the mortgagee by the deed, unless it be reformed.⁶ A mortgage describing land by township and range, without stating in what county or state the land was situated, was held void.⁷ And so was a mortgage describing land as parts of different sections, without stating the township or range.⁸

A mortgage of fifty acres of land by description, the same being part of the large farm, or the next and adjoining fifty acres that is unincumbered, provided the first be incumbered, is not

Leon v. Higuera, 15 Cal. 483; *Hancock v. Watson*, 18 Cal. 137; *Began v. O'Reilly*, 32 Cal. 11; *English v. Roche*, 6 Ind. 62; *Blakemore v. Taber*, 22 Ind. 466; *Morse v. Dewey*, 3 N. H. 539.

¹ *Starling v. Blair*, 4 Bibb (Ky.), 288.

² *Mills v. Shepard*, 30 Conn. 98.

³ *Wilson v. Boyce*, 92 U. S. 320.

⁴ *Tryon v. Sutton*, 13 Cal. 490.

⁵ *Whitney v. Buckman*, 13 Cal. 536.

⁶ *Peck v. Mallams*, 10 N. Y. 509; *Keifer v. Starn*, 27 La. Ann. 282; *White v. Hyatt*, 40 Ind. 385.

⁷ *Cochran v. Utt*, 42 Ind. 267.

⁸ *Boyd v. Ellis*, 11 Iowa, 97.

void for uncertainty as to either tract. The whole farm in such case is subject to the mortgage, which is to be satisfied out of any unincumbered tract, nearest to that first described; but the mortgage is not defeated although the whole farm be incumbered.¹

A mortgage which does not name the town, county, or state in which the land is situated may nevertheless be rendered certain in the description of the premises by a reference to another deed, which contains a full and accurate description; ² or to the land of the adjacent owners.³ A mistake in the number of a lot may be rendered immaterial by the boundaries, which will control when fixed and certain, as for instance, when they are public streets.⁴

67. The office of the habendum is to define the estate conveyed; to explain how long the grantee is to hold it, and whether in an absolute or qualified manner. To create an absolute and unqualified estate in the grantee the habendum must be to the grantee and his heirs.

A mortgage to one, "his executors, administrators, and assigns," without naming his heirs,⁵ or a mortgage to an individual, "his successors and assigns forever," without the word heirs,⁶ conveys only a life estate; and the executor of the mortgagee cannot maintain a writ of entry to foreclose the mortgage because it terminated with the mortgagee's life. A power of sale in such a mortgage, authorizing the mortgagee upon default to sell the land and execute a conveyance in fee simple, does not operate to enlarge the estate.

But a mortgage made to a treasurer of a corporation named, with habendum "unto him the said treasurer and his successors in office, to his and their use and behoof forever," the condition of the mortgage being that the mortgagor should "pay to the said treasurer, or his successors in office," a certain sum, was held to pass an estate in fee, on the ground that these expressions in the deed showed that the grantee took the conveyance simply as trustee for the corporation, and that the nature of the trust required that a

¹ *Lee v. Woodworth*, 3 N. J. Eq. (2 Green) 36; and see *Kruse v. Scripps*, 11 Ill. 98; *Gray v. Stiver*, 24 Ind. 174.

² *Robinson v. Brennan*, 115 Mass. 582.

³ *Ells v. Sims*, 2 La. Ann. 251.

⁴ *Cooper v. Bigly*, 13 Mich. 463.

⁵ *Clearwater v. Rose*, 1 Blackf. (Ind.) 137.

⁶ *Sedgwick v. Laffin*, 10 Allen (Mass.), 430.

fee should pass by the deed.¹ The estate of the trustee must be commensurate with the equitable estate of the *cestui que trust*.

A mortgage conveying to the mortgagee an estate for life only will not be reformed to convey a fee, as against the rights of a *bonâ fide* purchaser of the premises, without notice of any claim on his part of a greater estate than the mortgage as recorded purports to convey.² Although mortgages of real estate are usually in fee, constructive notice of the existence merely of a mortgage, with no notice as to the estate it is intended to convey, is not notice that the mortgage is in fee, if its terms convey a life estate only.

In a mortgage or other conveyance to a corporation it is usual to make the habendum to it and its "successors and assigns;" but neither of these words is necessary in a deed to a corporation aggregate to give it all the estate it can take in the land conveyed. There is an implied condition, in every conveyance to a corporation, that upon the civil death of the corporation while retaining the land it shall revert to the original grantor and his heirs.³

68. The covenants of a mortgage are usually those of a warranty deed, and have the same effect and construction. If, however, a mortgage with covenants be given for purchase money of land conveyed to the mortgagor by a deed having like covenants, and the mortgagor is evicted, he may recover damages in an action for breach of the covenant, and the vendor who holds the mortgage is not allowed to set up the covenants in the mortgage deed as a defence by way of rebutter, especially when he holds the plaintiff's promissory notes secured by the mortgage.⁴ "Various cases might be readily supposed," says Mr. Justice Dewey, "when such a defence ought not to prevail; as in cases of large payments advanced towards the purchase money, and a mortgage to secure only a small residue, and that, by the terms of the contract, to be paid at some remote future day. The rights of the defendant may be protected by postponing entry of judgment to await the set-off upon the mortgage debt."⁵ In other words, the covenants in the mortgage do not estop the mortgagee to re-

¹ Brooks v. Jones, 11 Met. (Mass.) 191. 459; Hubbard v. Norton, 10 Conn. 422;

² Wilson v. King, 27 N. J. Eq. 374.

Haynes v. Stevens, 11 N. H. 28; Smith v.

³ 2 Kent Com. 282, 307.

Cannell, 32 Me. 123.

⁴ Sumner v. Barnard, 12 Met. (Mass.)

⁵ See Sumner v. Barnard, *supra*.

cover upon those in his vendor's deed to him. As between these parties, the mortgagor for purchase money really pledges nothing but the interest which he obtained under his vendor's deed, and is answerable to him for no imperfection in the title existing before the conveyance. If the mortgage be redeemed, that is the end of it; and if it be foreclosed, the title which the grantor parted with is restored to him by foreclosure, or he gets the full benefit of it. One having the mortgagee's right after foreclosure is not allowed to recover damages for a breach of the covenant which existed at the time of the conveyance by the mortgagee; for the effect of such recovery would be, to obtain all that he parted with in the conveyance, and the value of the incumbrance, which he is relieved from removing by the foreclosure.¹

The covenants of warranty in a mortgage are often of importance, especially in cases where the mortgagor has no title, or an imperfect one at the time of making the mortgage, but afterwards acquires one; they operate by way of estoppel or rebutter then, so that the after acquired title enures to the benefit of the holder of the mortgage.

Except in this way the ordinary covenants are of little use in a mortgage, because the damages for a breach of them would only entitle the holder of the mortgage to recover the amount due him on the mortgage, and this he can more readily recover by suit for the mortgage debt upon the note or bond, or upon the covenant for the payment of it sometimes contained in the mortgage.

3. *The Condition.*

69. The usual words of the proviso are, that upon the payment of the debt or performance of the duty named, "then this deed shall be void." But any equivalent expression may be used;² and in fact if it appear from the whole instrument that it was intended as a security, although there be no express provision that upon the fulfilment of the condition the deed shall be void, it is a mortgage. The substance and not the form of expression is chiefly to be regarded; and an enlarged and liberal view is to be taken

¹ *Smith v. Cannell*, *supra*; *Brown v. Hancock v. Carlton*, 6 Gray (Mass.), 39, Staples, 28 Me. 497; *Hardy v. Nelson*, 27 61; *Cross v. Robinson*, 21 Conn. 379, Me. 525; *Geyer v. Girard*, 22 Mo. 159; 387; *Kellog v. Wood*, 4 Paige (N. Y.), Connor v. Eddy, 25 Mo. 72; *Lot v. 578.*
Thomas, 1 Penn. (N. J.) 407. See, also, ² *Adams v. Stevens*, 49 Me. 362.

of the instrument in order to ascertain and carry into effect the intention of the parties.¹ It is not necessary that the condition of the mortgage should be so certain as to preclude the necessity of extraneous inquiry as to what it really is, and whether it has been performed ;² as in the case of a mortgage to secure future advances or to indemnify a surety. But unless it appears upon what event the deed is to become void, or that it is to become void in some event, it is not a mortgage.³

70. Description of the debt secured. — To constitute a mortgage there must necessarily be a debt which is the subject of the security. But it is not necessary that there should be any personal liability for the payment of the debt : as in the case of a mortgage to secure advances to be made subsequently, the parties may agree that the mortgagee shall advance the money, and rely solely for his security upon the pledge of the real estate.⁴ Formerly, mortgages were frequently given for the security of existing debts without mentioning any note, bond, or other personal obligation. There can be no question as to their validity, not only as against the mortgagor, but against all claiming subsequently. Whether there can be any action against the mortgagor personally may depend upon the particular circumstances of different cases. Where there is a contract, express or implied, for the payment of the debt, this is not merged in the security created by the mortgage, and the creditor may maintain assumpsit.⁵

Literal exactness in describing the indebtedness is not required ; it is sufficient if the description be correct so far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it.⁶ The condition of a mortgage specified that the mortgagee was an accommodation indorser and signer for the mortgagors on sundry notes, drafts,

¹ *Steel v. Steel*, 4 Allen (Mass.), 417 ; 10 Cal. 197 ; *Hodgdon v. Shannon*, 44 N. Lanfair v. Lanfair, 18 Pick. (Mass.) 299 ; H. 572.

Skinner v. Cox, 4 Dev. (N. C.) L. 59.

² *Youngs v. Wilson*, 27 N. Y. 351.

³ *Goddard v. Coe*, 55 Me. 385 ; *Adams v. Stevens*, *supra* ; *Freeman's Bank v. Vose*, 23 Me. 98.

See chapter ix. ; *South Sea Company v. Duncomb*, 2 Stra. 919 ; *Hickox v. Lowe*,

⁵ *Yates v. Aston*, 4 Ad. & El. N. S. 182.

⁶ *Ricketson v. Richardson*, 19 Cal. 330 ; *Booth v. Barnum*, 9 Conn. 286 ; *Sheafe v. Gerry*, 18 N. H. 245 ; *Gilman v. Moody*, 43 N. H. 239 ; *Hurd v. Robinson*, 11 Ohio St. 232 ; *Gill v. Pinney*, 12 Ib. 38.

and bills of exchange, to the amount of \$50,000, which were then maturing; a particular description of which they were not able to give. The mortgagors were partners and were in a failing condition, and at the time the mortgages were given it was necessary to give the security before a more accurate description could be made; but this description was held to be sufficient.¹ Even a mortgage to secure all existing debts of the mortgagor to the mortgagee is not invalid for want of certainty in the amount secured.²

The condition of the mortgage must give reasonable notice of the incumbrance on the land mortgaged in order to affect the creditors of the mortgagor, who have no notice of the real incumbrance.³ It need not be so complete as to preclude extraneous inquiry concerning the liens on the property; but it must with reasonable certainty show what is the subject matter of the mortgage, and must so define the incumbrance that a fraudulent mortgagor may not substitute other debts and shield himself from the demands of his creditors.⁴ Where a mortgage described the debt as a note of \$1,000, which was never given, but the mortgagor was indebted to the mortgagee for goods sold to the amount of \$756, and the latter had agreed to furnish additional goods up to the sum of \$1,000, and the mortgagor made this mortgage as security for the whole, it was held void against an attaching creditor. The indebtedness actually existing could not be substituted for the indebtedness described.⁵

71. Note and mortgage to be construed together.—The note and mortgage when made at the same time, and in relation to the same subject, are a part of one transaction, and constitute one contract, and must be construed together as if they were parts of one instrument.⁶ They explain each other so far as the indebtedness is concerned.⁷ The mortgage usually describes the

¹ *Lewis v. De Forest*, 20 Conn. 427.

² *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Machette v. Wanless*, 1 Col. 225.

³ *Bacon v. Brown*, 19 Conn. 33; *Stoughton v. Pasco*, 5 Conn. 442, 446; *Merrills v. Swift*, 18 Conn. 257, 264.

⁴ *Hubbard v. Savage*, 8 Conn. 215; *Pettibone v. Griswold*, 4 Conn. 158; *Bramhall v. Flood*, 41 Conn. 68; *Stoughton v. Pasco*, 5 Conn. 446; *Crane v. Dem-*

ing, 7 Conn. 387, 396; *Booth v. Barnum*, 9 Conn. 286, 290.

⁵ *Bramhall v. Flood*, *supra*.

⁶ *Chick v. Willets*, 2 Kans. 384; *Round v. Donnel*, 5 Kans. 54.

⁷ *Crafts v. Crafts*, 13 Gray (Mass.), 360; *Somersworth Savings Bank v. Roberts*, 38 N. H. 22; *Bassett v. Bassett*, 10 N. H. 64; *Boody v. Davis*, 20 N. H. 140.

note, stating the date, amount, the makers of it, and the time when it is payable. Such description serves to identify the note.¹ The mortgage may describe the debt as well, and thus may qualify the terms of the note. For instance, where a note was given payable in five years from date, with interest at ten per cent., and at the same time a mortgage was given to secure the payment of the note, in which it was stipulated that the interest should be "payable annually," the agreement was held to be that interest at ten per cent. was payable annually, and that foreclosure might be had for the non-payment of the interest.² And so where the mortgage contained a stipulation that a general execution should not issue upon it, although a note accompanied the mortgage, it was held that the mortgagee could not recover a general judgment on the note, his remedy being limited to the property.³

Parol evidence is admissible to identify the note intended to be secured.⁴

Except in this way the mortgage notes constitute no part of the mortgage. They are not essential to its validity. They need not be produced in evidence, in order to establish the mortgage title and right to possession. The mortgage itself is a conveyance of the estate, and the recital in the condition of the notes secured is an admission of their existence, and of the existence of the debt. For the purpose of establishing the title or right of possession, the mortgage alone without the notes is sufficient evidence of title and of the mortgage debt.⁵

But upon the foreclosure of a mortgage it is necessary to produce the note if there be one; and if the note produced corresponds with the description in the mortgage as to date, amount, parties, rate of interest, and maturity, such correspondence, coupled with the possession of the note by the holder of the mortgage, raises a presumption of identity, and throws upon the mortgagor the burden of showing another note of like description.⁶ When no note or bond accompanies the mortgage, a recital of indebtedness in the mortgage is sufficient evidence of the debt in a suit to foreclose it.⁷

¹ *Webb v. Stone*, 24 N. H. 282, 287;
Sheafe v. Gerry, 18 N. H. 245, 248; *Robertson v. Stark*, 15 N. H. 109, 112.

² *Muzzy v. Knight*, 8 Kans. 456.

³ *Kennion v. Kelsey*, 10 Iowa, 443.

⁴ *Melvin v. Fellows*, 33 N. H. 401;
Prescott v. Hayes, 43 N. H. 593.

⁵ *Smith v. Johns*, 3 Gray (Mass.), 517.

⁶ *Jones v. Elliott*, 4 La. Ann. 303.

⁷ *Whitney v. Buckman*, 13 Cal. 536;
and see *Eyster v. Gaff*, 2 Col. 228.

72. Covenant for the payment of a debt.—Although it is essential that a mortgage should secure the payment of some debt or the performance of some duty, yet it is not essential that it should contain any covenant to that effect,¹ and it is not necessary that there should be any collateral or personal security for the debt secured.² In such case, of course, the remedy of the mortgagee is confined to the land alone.³

The mortgages commonly used in this country refer to the debt only in the condition, and there merely by way of recital of the event upon which the deed is to be void. It is seldom that any express promise is made by the debtor in the mortgage to pay the debt; and no promise can be implied from the recital in the condition. It is provided by statute in several states that no such promise shall be implied in the mortgage.⁴

When there is an express covenant in the mortgage for the payment of the debt, the mortgagee may maintain an action at law upon it. He is not confined to his remedy by foreclosure suit.⁵ "It seems to be generally admitted in the books," says Chancellor Kent, "that the mortgagee may proceed at law on his bond or covenant, at the same time that he is prosecuting on his

¹ See chapter ix.; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 257; *Hickox v. Lowe*, 10 Cal. 197.

In mortgages by indenture a clause something like the following is sometimes inserted:—

"And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the party of the second part, his executors, administrators, or assigns, the said sum of money and interest, as above mentioned and expressed in the condition of the said bond."

² *Mitchell v. Burnham*, 44 Me. 286; *Smith v. People's Bank*, 24 Me. 185; *Brookings v. White*, 49 Me. 479.

³ *Weed v. Covill*, 14 Barb. (N.Y.) 242.

⁴ See chapter ix.

⁵ *Brown v. Cascaden*, 43 Iowa, 103.

The covenant was as follows:—

"And the said party of the first part (the mortgagor) covenants with the said party of the third part (the mortgagee),

that he will pay the said mortgage money and interest on the days and times aforesaid."

The court say that such a covenant is no part of the condition of the instrument, and in no way pertains to the conveyance of the land. "It is not a covenant securing the mortgagee against the failure of the title, or warranting possession or enjoyment of the land. It is simply an obligation binding the mortgagor to pay the money. We know of no rule of law which will invalidate such a covenant, when found in a mortgage." In *Newbury v. Rutter*, 38 Iowa, 179, the mortgagors recited that "we are justly indebted" in a sum named, and "if from any cause said property shall fail to satisfy said debt, interest, and charges, we covenant and agree to pay the deficiency;" and there being no note for the debt, an action at law, without first foreclosing the mortgage, was sustained.

mortgage in chancery.”¹ Instead of pursuing both the remedy against the person and that against the thing, he may elect to pursue either one, and afterwards, if he has not obtained satisfaction, may follow the other.²

73. Interest is the thing the mortgage is made for when a loan of money has been made upon it, and the rate and time of payment are usually stated with care.³ Interest coupons are sometimes executed, payable at the several times when interest will be due upon the mortgage by its terms during the whole period it has to run. These are usually negotiable in form, and though detached from the mortgage note or bond, are still secured by the mortgage.

Interest is usually payable annually or semi-annually from the date of the mortgage. A provision for the payment of “interest annually on the first day of April in each year” makes the first interest due on the first day of April following the date of the mortgage, though its date be much later in the year.⁴

74. When the rate of interest is not named.—A mortgage debt made payable with interest, without naming the rate, bears interest at the rate fixed by law; and the law in force at the date of the instrument governs the rate.⁵ If the times when the interest shall be paid are not specified, but the language is such that some periodical payment is intended, it may be proved by parol evidence that the payments were to be made yearly, for instance, even as against a purchaser of the mortgaged premises.⁶ The terms of the mortgage cannot be changed as against a purchaser, but he is subject to the agreement contained in the mortgage, and to such construction as may be required of what is ambiguous. The proof of the periods at which the interest is payable does not alter the instrument, but merely supplies what was omitted, and is necessary to its proper interpretation.

¹ *Dunkley v. Van Buren*, 3 Johns. (N. Y.) Ch. 330.

² *Vansant v. Allnon*, 23 Ill. 30; *Lichty v. McMartin*, 11 Kans. 565.

³ For the rates of interest allowed in the several states, see chapter x.

⁴ *Cook v. Clark*, 3 Hun (N. Y.), 247; *Thomp. & C.* 493.

⁵ *Ackens v. Winston*, 22 N. J. Eq. 444.

⁶ *Ackens v. Winston*, *supra*. The language was, “within sixty days from the time it becomes due, at any time during the ten years.” This is sufficient to put a purchaser upon inquiry as to the periods of payment.

When the time of payment of the mortgage debt is definitely fixed, and the amount of it as well, interest is allowed from the date of the default, although not stipulated for in the mortgage or the note accompanying it. Interest follows in such case as an invariable legal incident of the principal debt.¹ But when the time of payment is uncertain, as for instance in case of a mortgage debt made payable at the decease of a third person, interest can be recovered only from the date of a demand of payment.²

The statutes of several states prescribe a rate of interest for contracts in which the parties have not agreed upon a rate, and for cases in which interest is given by law, but allow the parties to agree in writing for any rate of interest. Under such a provision the rate of interest agreed upon by the parties continues the same after the maturity of the obligation down to the time of rendering judgment upon it. The interest both before and after maturity is recoverable by virtue of the contract, as an incident or part of the debt.³

75. The time of payment of the debt secured should be fixed, so that it may be known with certainty when a default occurs. If no time of payment be named, the debt is payable upon demand, and suit may be brought to enforce both the debt and the mortgage immediately.

When the time of payment is fixed by the mortgage or the note secured by it, the mortgagor is not entitled to any notice of it.⁴ Grace is to be allowed in computing the time of payment of a mortgage note, or of any instalment of it, payable at a day certain, in the same manner as upon a note not secured by mortgage.⁵ It is allowed also upon an instalment of interest falling due at the same time with the principal or any instalment of the principal.

The usual form of power of sale mortgage in use in Massachusetts and other New England states provides, that upon a sale of the premises under the power the mortgagee may, out of the money arising from the sale, "retain all sums then secured by this deed, whether then or thereafter payable." This provision

¹ *Spencer v. Pierce*, 5 R. I. 63.

³ *Brannon v. Hursell*, 112 Mass. 63, and

² *Gardiner v. Woodmansee*, 2 R. I. 558.

cases cited.

⁴ *Ing v. Cromwell*, 4 Md. 31.

⁵ *Coffin v. Loring*, 5 Allen (Mass.), 153.

in effect makes the whole mortgage payable upon any default which authorizes the exercise of the power of sale, if he in fact does exercise the power; and in the form in common use the condition is for the payment of the principal, instalments, and interest at the times named, as also the taxes and insurance, and upon any breach of the condition the mortgagee may proceed to foreclose.

Of course in such case the right to receive payment of sums not due arises only upon a sale. And so when a trustee in a trust deed is empowered to sell the property when the first instalment falls due, and all the indebtedness is to be considered as matured upon the first default, for the purpose of the application of the trust fund, the indebtedness not then due cannot be considered as matured, so that a personal judgment can be rendered for it.¹

76. A stipulation that the whole sum shall become due and payable upon any default in the payment of any part of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture.²

In some states such a provision is so usual, that authority to an agent or officer to execute a mortgage, the terms and conditions of which are not specified, would authorize him to insert this provision; while in other states special authority to use this provision is necessary. His general authority only authorizes the use of the

¹ *Mason v. Barnard*, 36 Mo. 384.

² *Steel v. Bradfield*, 4 Taunt. 227; *James v. Thomas*, 5 B. & Ad. 40; *Mobray v. Leekie*, 42 Md. 474; *Schooley v. Romain*, 31 Md. 574; *Kramer v. Rebman*, 9 Iowa, 114; *Robinson v. Loomis*, 51 Penn. St. 78; *Stancil v. Norton*, 11 Kans. 218; *First Nat. Bank v. Peek*, 8 Kans. 660; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336; *Hale v. Gouverneur*, 4 Edw. (N. Y.) Ch. 207; *Noyes v. Clark*, 7 Paige (N. Y.) Ch. 179; *Ferris v. Ferris*, 28 Barb. (N. Y.) 29; *Valentine v. Van Wagner*, 37 Barb. (N. Y.) 60; *Crane v. Ward*, Clarke's (N. Y.) Ch. 393.

The following is a form of the interest clause frequently used:—

"It is thereby expressly agreed, that, should any default be made in the payment of the said interest, or of any part

thereof, on any day whereon the same is made payable, as above expressed; and should the same remain unpaid and in arrear for the space of days, then, and from thenceforth,—that is to say, after the lapse of the said days,—the aforesaid principal sum of dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, his executors, administrators, or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding, as by the said bond or obligation, and the condition thereof, reference being thereto had, may more fully appear."

terms and provisions ordinarily inserted, and therefore implied by the term mortgage. But the unauthorized use of this provision would not invalidate the mortgage in other respects, but only in this respect.¹

If the provision be that the mortgagee may upon default, or, after the default has continued a certain time, elect that the whole amount of the debt shall become payable, the mortgagee, after the happening of this contingency, cannot be compelled to accept the interest or instalment due, and yield his claim for the whole amount. In such case courts of equity have no power to relieve against the default and its consequences.² It is no ground for such relief that the mortgagor was unable to find the holder of the mortgage until the time of payment had passed.³ Of course there would be relief if the payment was prevented by fraud on the part of the mortgage creditor.

It is not essential that the interest clause or option clause, as it is sometimes called, should be contained in the note or bond as well as the mortgage, to make it effectual, inasmuch as both instruments are to be construed together.⁴

77. Payment of taxes.—The mortgage usually provides by way of covenant or condition that the mortgagor shall pay all taxes and assessments levied upon the premises.⁵ The payment of the taxes thus becomes as obligatory upon the debtor as the payment of the mortgage debt; and upon his failure to pay them, the mortgagee may pay them and have the amount included in any judgment that he may afterwards obtain upon the mortgage. Sometimes the mortgage provides that such taxes, when paid by the mortgagee, shall become a part of the mortgage debt; but without such provision the amount so paid in fact becomes a lien under the mortgage.⁶ A provision that the mortgagee may retain

¹ *Jesup v. City Bank of Racine*, 14 Wis. 331.

² *Malcolm v. Allen*, 49 N. Y. 448; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Broderick v. Smith*, 26 Ib. 539; S. C. 15 How. Pr. 434; *Valentine v. Van Wagner*, 37 Barb. (N. Y.) 60; S. C. 23 How. Pr. 400; *Hale v. Gouverneur*, 4 Edw. (N. Y.) Ch. 207; *Ferris v. Ferris*, 28 Barb. (N. Y.) 29; S. C. 16 How. Pr. 102; *Bennett v. Stevenson*, 53 N. Y. 508.

³ *Dwight v. Webster*, 32 Barb. 47; S. C. 19 How. Pr. 349.

⁴ *Schoonmaker v. Taylor*, 14 Wis. 313.

⁵ It is, in Maryland, provided by statute that there may be such a covenant. Pub. Gen. Laws 1860, art. 64, § 4.

⁶ See chapter xxxvii., and also *Stanclift v. Norton*, 11 Kans. 218.

This decision had reference to a statute then in force declaring that taxes so paid should be a lien on the land; but the

from the proceeds of a sale under the mortgage all charges and expenses incurred by reason of any failure of the mortgagor to perform the condition and covenants of the mortgage, includes payments for taxes and the like.

A stipulation in a mortgage, that upon a failure to pay the taxes levied upon the premises, the principal debt shall become immediately due and payable, is valid. It is similar to the provision very common in mortgages, and generally sustained, that the principal shall become due on a failure to pay the interest promptly.¹

This covenant cannot be enforced after the debt is discharged. It expires with the mortgage. The effect upon the covenant is the same whether the mortgagor voluntarily pays the mortgage debt, or whether it is paid by the mortgagee's buying in the mortgaged premises at a foreclosure sale. If, therefore, the mortgagee purchase at the sale for less than the debt, and the deficiency be paid by the mortgagor, he cannot afterwards be compelled to pay to the mortgagee the amount the latter has been obliged to pay to redeem the premises from sales for taxes assessed while the mortgage was in force. The covenant to pay taxes, being part and parcel of the mortgage, expires with it.²

78. Insurance. — It is usually a condition of the mortgage also that the mortgagor shall keep the buildings upon the mortgaged premises insured against fire in a certain sum for the benefit of the mortgagee at such insurance office as he may approve.³

A breach of this condition, or of the condition to pay the taxes assessed upon the premises, is as effectual in giving the mortgagee a right to enforce his mortgage as is a breach of the condition to pay an instalment of interest or principal, or to pay the principal debt.

4. *Special Stipulations.*

79. Special provisions of various kinds to suit the convenience of the parties may be inserted in the mortgage. Among those most frequently used is a provision that upon making certain payments the mortgagor shall be entitled to have certain portions

court declare that without the statute the mortgagee would probably have this right, in order to keep his security perfect. And see *Sharp v. Barker*, 11 Kans. 381.

¹ *Stanclift v. Norton*, 11 Kans. 218.

² *Hitchcock v. Merrick*, 18 Wis. 357.

³ See chapter xviii. on "INSURANCE."

of the mortgaged premises released from the operation of the mortgage; or a provision that the mortgagor may pay the whole or a part of the debt at his option before the time fixed for the payment of it.

A provision in a mortgage, reserving to the mortgagor "the right to pay all, or any part of said indebtedness, at any time during the present year (1863), in current paper funds" does not restrict him to a single payment of the entire amount due, but authorizes partial payments at different times during the year; and such payments were authorized, in treasury notes of the Confederate States, notwithstanding their great depreciation.¹

A stipulation for partial releases of lots embraced in the mortgage upon the payment of stipulated sums, "provided that the covenants and conditions of said mortgage shall be faithfully kept and performed" by the mortgagor, can be enforced only upon strict performance of the conditions, and making all payments of principal and interest as they become due. Such a covenant running only to the mortgagor, without mention of his assigns, is personal in its character, and cannot be enforced by a purchaser from him.²

A stipulation that in case the mortgagor should be able to sell the premises or mortgage them to another so as to pay off the mortgage debt, the mortgagee should reconvey to him, so as to enable him to carry out the transaction, does not confer upon him a power of sale, for he had that already, but operates as a covenant to reconvey for the purpose named.³

80. Mortgagor's possession. — The provision, now almost universally inserted in mortgages, that until default in the performance of the condition of the deed the mortgagor may hold the premises, was formerly exceptional. In 1819, Chief Justice Parker said that such a provision was seldom seen in Massachusetts.⁴ In another case in this state the same year the court say, that although parties intend that the mortgagor shall remain in possession, yet they go on making mortgages without any covenant respecting the possession.⁵ Evidence of the intention of the

¹ *Stalworth v. Blum*, 41 Ala. 319.

² *Pieree v. Kneeland*, 16 Wis. 672.

For construction of other provisions for release of portions of the property, see *Brigham v. Avery*, 43 Vt. 602.

³ *Coffing v. Taylor*, 16 Ill. 457.

⁴ *Smith v. Dyer*, 16 Mass. 18, 24.

⁵ *Colman v. Packard*, 16 Mass. 39, 40.

In Massachusetts it is provided that the statutes relating to foreclosure shall not

parties, or of their agreement at the time of making the mortgage, that the mortgagor should continue in possession until he should fail to perform the condition, cannot be received to control the settled rule of law, that without such provision the mortgagee is entitled to immediate possession.

But although the mortgagor's right of possession be not expressly provided for, he is entitled to it, if the condition of the mortgage be such as to imply his possession for the purpose of performing it.¹

When the mortgagor's right of possession is provided for, or necessarily implied, the mortgagee cannot enter until default, and cannot after that give any one else the right to occupy, and exclude the owner of the equity, until he has made actual entry or brought suit for possession.²

5. *Execution and Delivery.*

81. Sealing is an essential formality to the execution of any legal conveyance of real estate. In some states it is provided by statute that a scroll may be used in place of a seal, but this unseemly substitute for the ancient formality is only another formality none the less requisite.³ A mortgage executed without a seal, except in a few states where it is not required, is not a legal mortgage. In equity it amounts to a compact for a mortgage, and as such creates no lien as against purchasers from the mortgagor, or as against his creditors, or even against an assignee under a general assignment for the benefit of creditors.⁴

Signing is the act which imparts life to the deed. Although the most essential thing of all in the execution of the deed, it is a

prevent the mortgagee's entering on the premises or recovering possession before breach of the condition, when there is no agreement to the contrary, but in such case he must account for the rents and profits. Gen. Stat. c. 140, § 9.

¹ *Wales v. Mellen*, 1 Gray (Mass.), 512, and cases cited; *Clay v. Wren*, 34 Me. 187.

² *Silloway v. Brown*, 12 Allen (Mass.), 30.

³ See chapter xlii. on "REGISTRATION."

Chancellor Kent says: "Whether land should be conveyed by writing, signed by

the grantor only, or by writing signed, sealed, and delivered by the grantor, may be a proper subject for municipal regulation. But to abolish the use of seals by the substitute of a flourish of the pen, and yet continue to call the instrument which has such a substitute a deed, or writing sealed and delivered, within the purview of the common or the statute law of the land, seems to be a misnomer, and is of much more questionable import." 4 Com. 453.

⁴ *Erwin v. Shuey*, 8 Ohio St. 509; *Bloom v. Noggle*, 4 Ib. 45.

matter so much of course that it hardly need be mentioned among the requisites. A mortgagor is bound by a signature of his name made by another person in his presence and by his direction. If his name be subscribed by another in his absence, he may adopt the signature as his own. His acknowledgment of the deed is a sufficient recognition of it.¹

82. Witnesses.—The statutes of several states provide that mortgages and other conveyances of real estate shall be attested by witnesses, two being required in some states, one in others, and in others still none at all;² but this requirement, like that for the acknowledgment of deeds, has reference chiefly to the recording of them, and does not affect the validity of the instruments as between the parties if not observed.³ Although a mortgage defectively executed in this respect is not a legal mortgage, it may be enforced in equity.⁴

83. An acknowledgment is essential in order to admit a deed to record, but is not otherwise necessary as between the parties. This subject being fully treated of elsewhere, it is introduced here with special reference to stating that before the deed is acknowledged the execution of it must be complete in every other respect.⁵ The acknowledgment is the final act before the delivery of the deed, and must be made of a completed deed.

There can be no valid acknowledgment of a mortgage until all material parts of the instrument are written in, such for instance as the name of the grantee, and the amount of the lien.⁶

This rule applies with particular force to acknowledgments made by married women, where the law protects them by requiring a separate examination by the magistrate who takes the acknowledgment.⁷ In a case where a wife so acknowledged an instrument intended to be a mortgage of her separate lands, while there were blanks for the insertion of the mortgagee's name and the sum borrowed, it was urged that she should be estopped from denying that she had signed and acknowledged the mortgage. But Mr. Justice Nelson said: "The answer to this is, that to

¹ *Bartlett v. Drake*, 100 Mass. 174.

² See chapter xiii. on "REGISTRATION."

³ *Gardner v. Moore*, 51 Ga. 268.

⁴ *Lake v. Doud*, 10 Ohio, 415.

⁵ See chapter xiii. on "REGISTRATION."

⁶ *Drury v. Foster*, 2 Wall. 24.

⁷ *Drury v. Foster*, *supra*. Followed in *McQuie v. Peay*, 58 Mo. 56.

permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into law an entirely new system of conveyances of the real property of *feme covert*s. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. . . . The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was, therefore, nugatory. The truth is, that the acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*."

84. A delivery and acceptance of the mortgage are essential to its validity. — If not delivered directly to the mortgagee or his agent, but to a third person not authorized to act for him, it is essential to show the subsequent acceptance of it by the mortgagee, or else to show notice to him of the existence of the mortgage, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. Such presumption, as against others who may acquire an interest in the property, does not arise merely from the fact that the mortgage would be beneficial to him.¹ Until there be something more to show the grantee's acceptance, the presumption of it exists only for his benefit as against the grantor, his heirs, devisees, and ordinary creditors.² The possession of the deed by the mortgagee is presumptive evidence of his acceptance of it.³

Without delivery there is no mortgage.⁴ It takes effect only from the time of its delivery.⁵ The fact that a mortgage has been recorded raises no presumption of its delivery to the mortgagee against his denial of it. An actual delivery is not necessary, but

¹ *Bell v. Farmers' Bank of Ky.* 11 Bush (Ky.), 34; *Tuttle v. Turner*, 28 Tex. 759; *Evans v. White*, 53 Ind. 1; *Freeman v. Peay*, 23 Ark. 439.

² *Bell v. Farmers' Bank of Ky.* *supra*.

³ *Chandler v. Temple*, 4 Cush. (Mass.) 285; *Wolverton v. Collins*, 34 Iowa, 238.

⁴ *Croft v. Bunster*, 9 Wis. 503; *Freeman v. Peay*, 23 Ark. 439; *Hoadley v. Hadley*, 48 Ind. 452.

⁵ *Milliken v. Ham*, 36 Ind. 166.

there must be some act which in legal contemplation is equivalent to this.¹

Delivery may be made to an agent. When the mortgage is to a corporation, a delivery to any officer or attorney who customarily acts for it in such matters is sufficient.² An agent authorized to sell land, is authorized to accept delivery of a mortgage in part payment of the purchase money, unless it clearly appears that it was delivered to him for some other purpose.³

The fact of delivery may be shown by other writings of the parties, in which reference is made to the mortgage as an existing security; or by the subsequent acts of the parties with reference to it.⁴

If it should appear that a note and mortgage had been executed and left where the mortgagee could readily obtain wrongful possession of them and negotiate them, the maker's negligence might prevent his setting up the defence that they have no legal existence.⁵

85. A subsequent acceptance by the mortgagee of a mortgage delivered to the recording officer, or to an unauthorized third person, gives effect to it from the time of the first delivery, as between the parties to it; but as to persons who have acquired title to the property, or an interest in it, or lien upon it, through or under the mortgagor before the time of the actual acceptance of the deed by the mortgagee, the subsequent acceptance gives effect to the deed only from the time of such acceptance. In the mean time an attachment of the property as belonging to the grantor,⁶ or a judgment lien upon his property, will prevail.⁷ The acceptance cannot relate back so as to defeat the intervening lien.⁸

When a mortgage has been executed and tendered in compliance with an agreement of a debtor to make a mortgage, and the creditor refuses to accept the mortgage as a compliance with the agreement, and directs his agent to procure a mortgage that will meet the terms of the agreement, it has been held that the cred-

¹ *Foley v. Howard*, 8 Iowa, 56.

² *Patterson v. Ball*, 19 Wis. 243.

³ *Akerly v. Vilas*, 21 Wis. 88.

⁴ *Truman v. McCollum*, 20 Wis. 360.

⁵ See *Tisher v. Beckwith*, 30 Wis. 56; 437.

⁶ *Bell v. Farmers' Bank of Ky.* 11 Bush (Ky.), 34.

⁷ *Woodbury v. Fisher*, 20 Ind. 387.

⁸ *Goodsell v. Stinson*, 7 Blackf. (Ind.)

itor cannot afterwards accept the mortgage without the debtor's consent.¹

It is sufficient proof of the delivery of a mortgage that it was filed for record by the mortgagor, and was afterwards found in the mortgagee's possession.² The subsequent acceptance of it by the mortgagee ratifies the act and gives it effect from the time it was filed for record.³

86. A mortgage made for the purpose of being sold is not a lien in the mortgagee's hands as against subsequent purchasers or lien creditors, except from the time the advances are actually made upon it, either by the mortgagee or his assignee. An engagement on the part of the mortgagee, or another, to advance the money in the future, would be a consideration for the making of it sufficient to support it against other liens from the time of its delivery and record. An assignee who has notice that the mortgage was originally given without consideration, for the purpose of raising money by a subsequent sale of it, is put upon inquiry as to whether there were any liens intervening between its date and his purchase. The fact that the mortgagor negotiates the sale of the mortgage is a circumstance that should put the purchaser upon inquiry.⁴

Where a mortgage was made for the purpose of raising money for the mortgagor, and was recorded without any delivery to the nominal mortgagee, and before it was assigned and delivered to one who subsequently bought it another person acquired a lien upon the mortgaged premises, the latter was held to have priority. The mortgage in such case has life and validity only from the time of its assignment and delivery to the assignee for value; and it can have no retroactive operation so as to prejudice others who have acquired rights in the mean time. It is immaterial in this respect that the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgagee advanced the whole sum of principal secured by the mortgage without abatement, and that there was no off-set, or defence to it.⁵

¹ *Adams v. Johnson*, 41 Miss. 258.

² *Haskill v. Sevier*, 25 Ark. 152; *Carnall v. Duvall*, 22 Ark. 136.

³ *Carnall v. Duvall*, *supra*.

⁴ *Mullison's Appeal*, 68 Penn. St. 212.

⁵ *Schafer v. Reilly*, 50 N. Y. 61.

87. A delivery in escrow is sufficient, and the fact that the depositary was at the time an agent of the mortgagee, or where the mortgagee is a corporation the fact that he was then a director of it, does not prevent his holding in escrow.¹

A mortgage and note placed in the hands of a third person, to be delivered to the mortgagee upon the happening of a certain event, and delivered by him without authority, without waiting for such event, are invalid, and cannot be enforced even by a *bonâ fide* holder for value.² There is in such case no delivery of the note and mortgage, and they have never had a legal existence. A promissory note, although it be negotiable, can have no legal inception without a delivery of it; and the rules of commercial paper do not apply in such case; these can operate only after the paper has a valid existence. As in the case of a forged note, or of one purloined from the maker, the inquiry goes back of all considerations of negotiability, and the effect of that, to the existence of the paper as a legal obligation.

A mortgage executed without consideration, and deposited in escrow to await the performance of conditions which would make a consideration for it, cannot be made operative by a fraudulent delivery before the performance of the conditions, and without the mortgagor's consent. The mortgage in such case never becomes operative at all. It is void from the beginning.³

88. Acceptance of *cestui que trust* presumed. — In the execution of a trust deed to secure a debt it is not necessary that the *cestui que trust* should sign it, or in any way assent to it in writing.⁴ The deed passes the legal title as soon as it is executed by the grantor and trustee, and can be avoided only by the dissent, express or implied, of the creditor.

89. The date. — A mortgage is not invalid, although it is not dated, or has a false date, or an impossible one, as, for instance, February 30th, provided the real day of its date or delivery can be proved. The date, being no part of the substance of the deed, may be contradicted. It is said in some cases that there is a

¹ Andrews v. Thayer, 30 Wis. 228.

Burson v. Huntington, 21 Mich. 415; An-

² Chipman v. Tucker, 38 Wis. 43, and cases cited; S. C. 20 Am. R. 1.

draws v. Thayer, 30 Wis. 228.

⁴ Skipwith v. Cunningham, 8 Leigh

³ Powell v. Conant, 33 Mich. 396. See (Va.), 271.

presumption that a mortgage was executed and delivered on the day of its date, arising from the due execution, acknowledgment, and record of it.¹ If the date of the mortgage be later than that of the acknowledgment, it may be shown that the date of the acknowledgment is erroneous, and that the mortgage was not acknowledged until after it was executed.²

6. *Filling Blanks, Making Alterations, and Reforming.*

90. The filling of blanks after execution. — A blank form of mortgage signed and acknowledged, and afterwards filled up in the signer's absence by another person without written authority, so as to make it a mortgage on land owned by the person signing the paper, is not a deed in writing valid to pass an estate in land under the statute of frauds.³ The ancient doctrine of the common law, as stated in Sheppard's Touchstone,⁴ is, that "Every deed well made must be written; *i. e.* the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This remains the law in England,⁵ and is generally supported by the authorities in this country.⁶

¹ *Lyon v. McIlvaine*, 24 Iowa, 9; *Seavey v. Browning*, 18 Iowa, 246.

² *Hoit v. Russell*, 56 N. H. 559.

³ *Ayres v. Probasco*, 14 Kans. 175, and cases cited.

⁴ Page 54.

⁵ *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Davidson v. Cooper*, 11 M. & W. 793. These cases distinctly overrule *Texira v. Evans*, cited and stated by Wilson, J., in *Master v. Miller*, 1 Anstr. 225, as follows: *Evans* wanted to borrow £400, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond; *Texira* lent £200 on it, and the agent accordingly filled up the blanks with that sum and *Texira's* name, and delivered the bond to him. On *non est factum*, Lord Mansfield held it a good deed.

⁶ The doctrine that written authority is

requisite for the filling up of material blanks in a deed after execution is declared in: —

ARKANSAS: *Cross v. State Bank*, 5 Pike, 525.

CALIFORNIA: *Upton v. Archer*, 41 Cal. 85.

GEORGIA: *Ingram v. Little*, 14 Ga. 173.

ILLINOIS: *People v. Organ*, 27 Ill. 27.

KANSAS: *Ayres v. Probasco*, 14 Kans. 175.

KENTUCKY: *Cummins v. Cassily*, 5 B. Mon. 74.

MASSACHUSETTS: *Burns v. Lynde*, 6 Allen, 305.

MARYLAND: *Byers v. McClanahan*, 6 Gill & J. 250.

MISSISSIPPI: *Williams v. Crutcher*, 5 How. 71.

NORTH CAROLINA: *Graham v. Holt*, 3 Ired. L. 300.

OHIO: *Ayres v. Harness*, 1 Ohio, 368.

"The filling of the blanks," said Mr. Justice Chapman in a case in which this rule of the common law was asserted by the Supreme Court of Massachusetts,¹ "created the substantial parts of the instrument itself; as much so as the signing and sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed. We do not think such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes, which provide for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based

TENNESSEE: *Gilbert v. Anthony*, 1 Yerg. 69; *Mosby v. State of Ark.* 4 Sneed, 324.

VIRGINIA: *Preston v. Hull*, 23 Gratt. 600.

But the authority of *Texira v. Evans* has been adopted by some authorities in this country: *Ex parte Kerwin*, 8 Cow. (N. Y.) 118; *Chauncy v. Arnold*, 24 N. Y. 330, where the earlier cases in NEW YORK are cited; and although the doctrine of *Texira v. Evans* is spoken of by Mr Justice Smith as the settled doctrine in that state, yet Mr. Justice Denio speaks with apparent approval of the English cases overruling the "looser doctrine" of that case. In the case before the court the question whether the mortgagee's name could be filled in by one acting for the mortgagor, under parol authority, was left undecided; for in that case the name of the lender was not filled in at all; and it was held that the mortgage was ineffectual as security in the hands of one who had advanced money upon it in that condition. See, also, *Campbell v. Smith*, 8 Hun (N. Y.), 6.

The authority of *Texira v. Evans* has also been followed in SOUTH CAROLINA: *Duncan v. Hodges*, 4 McCord (S. C.), 239.

It was followed in the earlier cases in PENNSYLVANIA: *Wiley v. Moore*, 17 S. & R. 438; but in *Wallace v. Harmstad*, 15

Penn. St. 462, Chief Justice Gibson said that *Texira v. Evans* could only be sustained on the ground that the obligor had estopped himself by an act *in pais*; which is in effect to wholly discard the doctrine of the case.

There is a *dictum* by Mr. Justice Nelson, of the Supreme Court of the United States, followed by Wagner, J., in Missouri, that a person competent to convey real estate may sign a deed in blank and authorize an agent to fill it up; but it was held in both cases that a married woman could not make such a conveyance of her separate estate, having no authority to delegate such powers. *McQuie v. Peay*, 58 Mo. 56; *Drury v. Foster*, 2 Wall. 24.

It is followed, also, in WISCONSIN: *Van Etta v. Evanson*, 28 Wis. 33; *Vliet v. Camp*, 13 Wis. 198.

In *Van Etta v. Evanson*, *supra*, where it was held that the name of the mortgagee might be filled in by an agent, after the execution of the mortgage, the ground was taken that the fact of the delivery of the paper to the agent sufficiently showed the intention that he should supply the name of the person who might take the mortgage.

INDIANA: *Richmond Manufacturing Co. v. Davis*, 7 Blackf. (Ind.) 412.

MAINE: *South Berwick v. Huntress*, 53 Me. 89, where many cases are cited.

¹ *Burns v. Lynde*, 6 Allen (Mass.), 305.

on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is, to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even where there is no fraud. . . . If this method of executing deeds is sanctioned, it will follow that, though the defendant has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee, what land should have been described, whether the deed should have been absolute or conditional, and if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity."

91. Written authority essential for filling any material blank.—This doctrine respecting the execution of deeds applies as well to the filling up of any blanks left in them which materially affect their meaning and operation. If any such blanks be filled after execution by another person having only verbal authority, unless the instrument be redelivered and acknowledged anew, it is void. Such authority to another to fill up an instrument or any material part of it after its execution is sufficient in case of a simple contract, but not for filling up a sealed instrument. The stream can never rise higher than its source. Authority to make an instrument under seal, or to affix a seal to it, must be given by an instrument of equal authority.¹

Accordingly it is held that the name of the grantee or mortgagee cannot be properly filled in after execution of the instrument.

Where the mortgagor after the execution of the deed by his

¹ *Upton v. Archer*, 41 Cal. 85.

In a case recently before the Court of Appeals in Virginia (*Preston v. Hull*, 23 Gratt. 600), where the filling in of the name of an obligee in a bond, after the execution of it, was held to render it invalid, the doctrine of the text was fully declared. Upon the point under consideration Mr. Justice Staples said: "If the name of the obligee may be inserted, why may not the sum also; and if these may be supplied, why not the more formal parts

of the deed? If we once depart from the rule, how is the line to be drawn consistently with the preservation of any rule at all? If we say that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also. We shall be carried on step by step, if we mean to be consistent, until we have destroyed all the well settled distinctions between sealed and unsealed instruments."

wife, without her knowledge, inserts the description of additional property, the mortgage is a valid lien upon the property originally covered by it; and though it would ordinarily be valid as to the additional property against the husband, it is not so when the additional property is a homestead, for the conveyance of which it is necessary that husband and wife should join.¹

92. Mortgagor may be estopped from taking advantage of the irregularity. — It frequently happens that a mortgagor whose deed has been filled up after its execution by some one not authorized in writing will be estopped, by his acts in relation to the transaction, from claiming that it is void. But the mere fact that he has enjoyed the benefit of the money obtained upon it, or a portion of the money, is not by itself a sufficient ground upon which to found an equitable estoppel. Thus where a deed was so filled up and delivered to the grantee, who was ignorant of any irregularity in the execution of it, and the grantors being fully advised of the delivery of the deed permitted the grantee to enter into possession and make improvements, and became his tenants and paid him rent, they were not allowed to claim that the deed was void by reason of such irregularity.²

93. When estoppel may be set up. — A mortgagee invoking the aid of estoppel must show that he has been vigilant and careful in the protection of his own rights and interests. No protection will be given him against his own negligence and folly.³ To avail himself of the acts or admissions of the mortgagor, he must have been ignorant of the irregularity in the execution of the mortgage, and must have taken it with good reason to suppose it was properly executed.

Moreover, the subsequent acts of the mortgagor are no admis-

¹ Van Horn v. Bell, 11 Iowa, 465.

² Knaggs v. Mastin, 9 Kans. 532.

³ Ayres v. Probasco, 14 Kans. 175. Mr. Justice Valentine said: "Where a person negligently or knowingly puts it within the power of some other person to swindle and defraud him, and he is thereby swindled and defrauded, he is generally allowed to suffer the consequences of his own negligence and folly." In the case before the court, the mortgagee, through his agent,

knew that the mortgage was executed in blank and afterwards filled up in the absence of the wife, whose land it was intended to mortgage, inasmuch as the deed was filled up in the agent's presence. When the mortgage so executed was offered to him he should have said: "I know that mortgage is void, as a mortgage of Mrs. Ayres; I will, therefore, not receive it. You must furnish me a better mortgage if you want the money."

sion or ratification of the giving of the mortgage, unless the facts of the transaction be known to him.¹ He cannot ratify a thing that he does not know the existence of, and cannot be estopped by acts he never performed.

94. A material alteration of a mortgage made without the consent of the mortgagor by the holder of it, or by any one after delivery, and while in the possession or custody of the rightful owner of it, has the effect of destroying and annulling the instrument as between the parties to it.² An alteration by a mere stranger without the knowledge or consent of the holder, and while it is out of his custody, does not have this effect.³ This principle was applied to making void a mortgage altered under the following circumstances: A married woman being the owner of a house and lot, known as lot H, executed a mortgage to secure her husband's debt, in consideration of the extension of the time of payment. The mortgage, however, did not describe her property, but described a lot known as lot 26. After the delivery of the deed the error was discovered, and the mortgagee's attorney took the mortgage to the husband and his attorney for correction. The words, "being the same property conveyed to party of the first part," &c., describing the deed to the mortgagor of lot H, were added to the description contained in the mortgage, by the husband's attorney, in the presence of the attorney of the mortgagee, without consulting the wife in regard to the alteration, and she had no knowledge of the change until suit was brought to reform and foreclose the mortgage. It was held that the suit could not be maintained for either purpose.⁴

95. An alteration of an instrument which does not change its legal effect does not in law amount to an alteration, and of course does not invalidate it either at law or in equity.⁵ An alteration which does change the legal effect of the deed may at any

¹ In the same case, in illustration of this point, the same justice said: "There is no evidence showing that Mrs. Ayres ever beforehand authorized said mortgage to be filled up as it was in fact filled up, or ever afterward knew that the same was so filled up, or ever knew that it was delivered to Probasco as the mortgagee, or ever

performed an act which could be construed into a ratification of the instrument."

² *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365.

³ *Marcy v. Dunlap*, *supra*, per Johnson, J., and cases cited.

⁴ *Marcy v. Dunlap*, *supra*.

⁵ *Goodenow v. Curtis*, 33 Mich. 505.

time be made by consent of both parties to it; thus it has been held, that authority given in a mortgage to the recorder to insert a portion of the description omitted, when it could be obtained, is equivalent to a power of attorney to make such addition, and that a subsequent incumbrancer could not object to the exercise of this power.¹ It would seem, nevertheless, that the description given in the mortgage to warrant such a filling up must be sufficient to indicate the property to be described with such certainty that the lien upon it would exist without such further description.

A mortgage is not rendered invalid by the grantee's fraudulently adding the name of the mortgagor's wife in release of dower.² It is valid as against the husband without the wife's signature. The title to the property passes and vests in the grantee by the execution of the deed, and the subsequent alteration or destruction of the instrument does not affect this title.

96. The terms of a mortgage cannot be varied by any verbal agreement, or understanding of the parties, anterior to the execution of it. It cannot rest partly in writing and partly in parol. No evidence of the acts or conversation of the parties prior to the execution of the mortgage, or at the time of it, can be admitted to contradict or vary the instrument.³

The fact that a mortgagor before the signing of the mortgage objected to the terms of it, and desired to reserve a certain portion of the property included in it, cannot be received to vary the effect of it.⁴ Even an agreement of the parties, at the time of the execution of the mortgage, that it should not be a lien upon certain portions of the property included in it, would have no effect against the terms of it.

The terms of the mortgage may, however, be varied by a written agreement executed at the time of the mortgage. Such an

¹ *Harshey v. Blackmarr*, 20 Iowa, 161. The description was as follows:—

"We, J. L. Blackmarr and Belinda (his wife), sell and convey unto John Harshey, &c., the following described premises, in Marshall County, Iowa, to wit: eighty acres of land, bought of Rev. James M. Holland, lying two miles southward from Marshalltown, in Marshall County, Iowa; and so soon as the numbers of the above

lands are obtained, we agree that they shall be inserted in this deed, as our voluntary act, and the recorder of Marshall County is instructed to do the same for us."

² *Kendall v. Kendall*, 12 Allen (Mass.), 92.

³ *Quartermours v. Kennedy*, 29 Ark. 544.

⁴ *Patterson v. Taylor*, 15 Fla. 336.

agreement then becomes in fact a part of the mortgage, and the two instruments must be construed together.¹

97. Reforming the mortgage. — Whenever there has been a material omission or mistake in the deed, so that it fails to express what the parties intended, a court of equity may, as between the parties, reform and correct it in accordance with the transaction as it was actually agreed upon.² Thus, for instance, when part of the lands agreed to be mortgaged were omitted in the mortgage deed, it may be so reformed as to include them.³ And so, on the other hand, if by mistake it include land not belonging to the grantor,⁴ or other land of his not intended to be included, the description may be reformed.

When a mistake is clearly shown, a claim by the adverse party of misapprehension on his part will not be regarded.⁵ A material mistake in any part of the deed, as for instance in the condition, may be reformed.⁶ But the court will not correct a mere error of statement as to the origin of the mortgagor's title, when the deed is effectual as it stands.⁷

The court will not reform a deed so as to add to it a new condition not contemplated by one of the parties in the execution of it;⁸ it will not make it include what was intended by one party unless it appear that the other party at the time had the same intention; or unless the other party fraudulently induced him to believe the mortgage contained what he asks to have it made to include; as where the mortgagor by false and fraudulent representations induced the mortgagee to believe, when he loaned the money and accepted the mortgage, that it covered more and other land and buildings than it did, the mortgage was reformed, and enforced against the lands fraudulently omitted.⁹

98. Who may obtain reformation. — A mortgagee who has sold the note and mortgage, and afterwards bought them back

¹ *Pitzer v. Burns*, 7 W. Va. 63.

² *Anderson v. Baughman*, 7 Mich. 69; *Loomis v. Hudson*, 18 Iowa, 416.

³ *Blodgett v. Hobart*, 18 Vt. 414.

⁴ *Ruhling v. Hackett*, 1 Nev. 360.

⁵ *Wooden v. Haviland*, 18 Conn. 101.

⁶ *Wooden v. Haviland*, *supra*.

⁷ *Hathaway v. Juneau*, 15 Wis. 262.

⁸ *Hart v. Hart*, 23 Iowa, 599, where the court refused to reform a mortgage for support, so as to require the mortgagee to live at a particular place.

⁹ *De Peyster v. Hasbrouck*, 11 N. Y. 582; and see *Rider v. Powell*, 28 N. Y. 310.

again, has the same right to have a mistake corrected as he had before he made the transfer, if he indorsed the note at the time of the sale.¹ He may have the mistake corrected upon its discovery for the first time after he has purchased the land under a foreclosure sale, and taken possession as purchaser.² But the court will not reform a description in a mortgage deed at the suit of another who has become purchaser at a sale by the mortgagee.³

The party desiring a reform of a deed should bring a bill in equity for the purpose. A mortgagor cannot ask for this relief in answer to a bill to foreclose; but he may file a cross-bill.⁴ The mortgagee may ask for a reformation of the mortgage in a bill to foreclose it.⁵

“The proof of mistake must be clear and certain before an instrument can be reformed; as the object of the reformation of an instrument is to make it express what the mind of the parties to it had met upon, and what they intended to express, and supposed they had expressed, in the writing. Unless this meeting of minds, and mistake in expressing it, is made quite clear and certain by evidence, the court, should it undertake to reform, might, under color of reformation, make a contract for the parties which both never assented to, or intended to make.”⁶

99. Against whom it may be had.—A mistake in the description of the land may be corrected as between the parties, but courts of equity can grant no relief as against one who has purchased the property in good faith and for a valuable consideration; and consequently a bill which seeks to do this is defective, when it fails to allege that the purchaser took the land with notice of the mistake.⁷ It is obvious, however, that a purchaser with notice stands in no better position than the mortgagor himself.⁸ As against a purchaser at an execution sale, notice of the mistake before or at the sale is sufficient.⁹

But it may be reformed as against a junior mortgagee, whose

¹ Kennard v. George, 44 N. H. 440.

⁷ Sickmon v. Wood, 69 Ill. 329.

² Davenport v. Sovil, 6 Ohio St. 459.

⁸ Rutgers v. Kingsland, 7 N. J. Eq. (3

³ Haley v. Bagley, 37 Mo. 363.

Hals.) 178, 658; Fiedler v. Varner, 45

⁴ French v. Griffin, 18 N. J. Eq. 279.

Ala. 429; Ruhling v. Hackett, 1 Nev.

⁵ Alexander v. Rea, 50 Ala. 450; Miller v. Kolb, 47 Ind. 220.

360; Strang v. Beach, 11 Ohio St. 283.

⁶ Per Johnson, J., in Marcy v. Dunlap, 5 Lans. (N. Y.) 365, 370.

⁹ Williams v. Hatch, 38 Ala. 338.

mortgage was taken, without notice of such a mistake, as security for an antecedent debt, without the surrender of any old security, and without any new consideration moving from him.¹ The mistake may be corrected too against a subsequent judgment creditor;² but not against a purchaser of a subsequent judgment, who has invested his money in the purchase of the judgment upon the faith of the apparent lien upon the land.³ The equity of the mortgagee is regarded as stronger than that of the judgment creditor, who has not, probably, parted with his money on the faith of the apparent facts. But when the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties as they appear in the respective securities, it is not considered that there is any superior equity in the mortgagee.⁴

100. On proof of the loss of a mortgage deed without record of it having been made, the court may, under ordinary circumstances, decree the making of a new mortgage.⁵ This may be the only adequate remedy, and without it the mortgagee may be exposed to the total loss of his security. The loss of deeds is a familiar ground of equitable relief.

101. Principles of construction.—One principle of construction applicable to mortgages is, that inasmuch as the mortgagor is supposed to make his own selection of words and terms in drawing the deed, whenever its language is equivocal or ambiguous, to construe it most strongly against him, and in such manner as to make it a valid and binding security.⁶

Another principle of construction is, that the intention of the parties as gathered from the instrument is to govern, if the intention be such that it may be legally enforced. "There is no doubt that the intention is the object to be sought for in construction. And to get at that, the situation of the parties, and the nature and object of their transactions, may be looked at. But it must

¹ *Busenbarke v. Ramey*, 53 Ind. 499.

² *Sample v. Rowe*, 24 Ind. 208; *White v. Wilson*, 6 Blackf. (Ind.) 448.

³ *Flanders v. O'Brien*, 46 Ind. 284.

⁴ *Flanders v. O'Brien*, *supra*.

The rule is otherwise, however, in Ohio;

Van Thorniley v. Peters, 26 Ohio St. 471; *White v. Denman*, 1 Ohio St. 110; 16 Ohio, 59; *Hood v. Brown*, 2 Ohio, 266.

⁵ *Lawrence v. Lawrence*, 42 N. H. 109, and cases cited.

⁶ *Jerome v. Hopkins*, 2 Mich. 96, 100.

be borne in mind that it is not the business of construction to look outside of the instrument to get at the intention of the parties, and then carry out that intention whether the instrument contains language sufficient to express it or not; but the sole duty of construction is to find out what was meant by the language of the instrument.”¹

¹ Paine, J., in *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 15 Wis. 424, 438.

CHAPTER III.

THE PARTIES TO A MORTGAGE.

PART I.

WHO MAY GIVE A MORTGAGE.

102. Legal capacity to mortgage. — In general, any person who has a legal capacity to act for himself may make a mortgage of his property, or may authorize any one else to do this in his behalf. By statutory provisions in many states, guardians or others acting for infants, insane or other persons, without legal capacity to act for themselves, may be authorized, upon application to court showing sufficient cause, to convey in mortgage the real estate of their wards. Like authority is sometimes given to trustees, executors, or administrators, although not having title to the property themselves, but only authority over it for certain purposes, and acting in a representative capacity in respect to it, to mortgage it for the benefit of the parties in interest. These statutory mortgages, as they may be called, depend upon the particular provisions authorizing them, which are too various to be given here. It may be remarked, however, that this statutory power must be exercised strictly for the purposes for which it is given, and all the requirements of the statutes in regard to obtaining and exercising the authority must be strictly followed.

A corporation, if capable of holding real estate, has, like a person, the power of conveying it in mortgage, unless it is under some disability imposed by statute. But while a person capable of making a grant may, if he choose, employ another to act for him, a corporation must always act by an agent.

Disabilities are either natural, as in the case of insane persons, or legal, as in the case of married women and corporations, while the disability of infancy is either the one or the other, according to the circumstances of the case.

1. *Disability of Insanity.*

103. A mortgage made by one who was insane at intervals both before and after the execution of it, as to its validity, depends upon the question whether he was sane at the time; and the fact of his sanity must in such case be established by clear and satisfactory evidence.¹ If the mortgagor at the time he executed the mortgage comprehended what he was doing, and the consequences of his acts, it will be held valid, if it be fair and no undue advantage has been taken of him, although it may appear probable that there were times, previous to the execution of the mortgage, when he might not have had sufficient capacity, on account of a disease which would not be uniform in its influence on his mind.² But an injunction to prevent a sale by a mortgagee was made perpetual, where it appeared that the mortgagor was in a condition verging upon insanity through habitual drunkenness, and the mortgagee, who had complete power over him, could not show that he had given any valid consideration for the mortgage.³

2. *Disability of Infancy.*

104. An infant's mortgage for purchase money. — An infant who has purchased land, and given back a mortgage for the purchase money or a part of it, may, upon coming of age, avoid the transaction; he may relinquish the property and reclaim the money paid on account of it.⁴ But if he seeks to avoid the debt and mortgage, he must surrender and reconvey the property. If he continue to hold the estate and to apply it to his own uses, he affirms the mortgage and makes himself legally liable for its payment.⁵ The contract being voidable only, if he wishes to disaffirm it, he must do so promptly upon coming of age.⁶ If he ratifies the conveyance to himself, he ratifies his mortgage for the purchase money. They constitute one transaction, and he cannot enjoy the one without being bound by the other.⁷

¹ *Ripley v. Babcock*, 13 Wis. 425.

² *Day v. Seely*, 17 Vt. 542.

³ *Van Horn v. Keenan*, 28 Ill. 445.

⁴ *Willis v. Twombly*, 13 Mass. 204.

⁵ *Roberts v. Wiggin*, 1 N. H. 73; *Robbins v. Eaton*, 10 N. H. 561; *Badger v. Phinney*, 15 Mass. 359; *Callis v. Day*, 38

Wis. 643; *Bigelow v. Kinney*, 3 Vt. 353; *Hubbard v. Cummings*, 1 Greenl. (Me.)

11; *Young v. McKee*, 13 Mich. 552;

Henry v. Root, 33 N. Y. 526, 553; *Lynde*

v. Budd, 2 Paige (N. Y.), 191; *Kitchen v.*

Lee, 11 Ib. 107; *Contant v. Servoss*, 3

Barb. (N. Y.) 128.

⁶ *Loomer v. Wheelwright*, 3 Sandf. (N. Y.) Ch. 135.

⁷ *Dana v. Coombs*, 6 Greenl. (Me.) 89; *Heath v. West*, 8 Fost. (N. H.) 101.

He is not allowed after coming of age to try his chances of gaining something by the transaction, and then, upon finding that he cannot, to plead his disability. If an action to foreclose the mortgage be brought after his coming of age, and he allows a decree of sale to be entered, he cannot then, upon finding there is a deficiency instead of a surplus, escape liability for it by setting up his disability.¹

105. Ratification of infant's mortgage. — A mortgage given by an infant, being as a general rule voidable only and not void, he may on coming of age ratify it. This he may do in various ways. The mere retaining possession of land, for which he has given a mortgage for the purchase money, is a ratification of the whole transaction, and makes him liable upon the mortgage.² So any other mortgage for his benefit he may on coming of age make good and effectual by recognizing or confirming it. His conveyance of the same land, after attaining his majority, subject to the mortgage, is a sufficient confirmation of it.³ A subsequent execution of a deed to a third person, which does not refer to the mortgage, does not necessarily amount to a repudiation of the mortgage.⁴ And so a will made by one after coming of age, whereby he directed the payment of "all his just debts," was after his death held to be a sufficient confirmation of a mortgage and bond executed during his infancy to secure the payment of borrowed money.⁵

The subsequent ratification in all cases relates back to the original execution of the mortgage as against all persons except purchasers for a new and valuable consideration.⁶

It has been held, however, that a mortgage by an infant which was not in any way for his benefit, as for instance, one made as surety for another, is not merely voidable, but void, and therefore not subject to ratification. Thus a mortgage given by an infant

¹ *Flynn v. Powers*, 35 How. (N. Y.) Pr. 279; S. C. aff. 36 Ib. 289.

² *Callis v. Day*, 38 Wis. 643, and cases cited; and see *Schouler's Dom. Rel.* 518 *et seq.*

³ *Story v. Johnson*, 2 Y. & C. Exch. 607; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Lynde v. Budd*, 2 Paige (N. Y.), 191; *Phillips v. Green*, 5 Mon. (Ky.)

355. Or by part payment. *Keegan v. Cox*, 116 Mass. 289.

⁴ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁵ *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. (N. Y.) Ch. 544.

⁶ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

feme covert, to secure the debt of her husband, is held to be absolutely void, and incapable of confirmation.¹

Coverture of a female infant does not remove the disability of minority. Therefore if she has given a mortgage of her land during her minority, her husband joining in it, she may repudiate it on coming of age, and she is not bound to return the consideration received unless she still has the proceeds of it in her hands specifically.²

3. *Married Women.*

106. At common law a married woman could not make a mortgage even to secure the payment of the purchase money of real estate conveyed to her. Both the mortgage and the note were void.³ She had no power to make contracts. In equity, however, she has long occupied quite a different position in regard to her own property, and her power to contract in relation to it. In England the courts of equity have extended her rights over her separate estate and her liability for her contracts, until it is now the settled doctrine that her property is holden in equity for her engagements, whether in writing or not. Yet at law they cannot be enforced. Her obligations are not strictly debts. She is not personally holden for them; but her separate estate is subjected to their payment. The proceeding to enforce them, therefore, is in the nature of a proceeding *in rem*.

In this country the common law rights and liabilities of married women have been changed almost wholly by statute. Liberal provision is generally made in all the states for the holding of separate property by married women, and for their contracting in relation to it. But they have not gone to the extent of declaring that her separate estate shall be liable generally for her pecuniary engagements. Under these statutes, as a rule, she is merely authorized to contract with reference to her separate property; and she is not allowed to do this even, except with the concurrence of her husband, or with the approval of some court.⁴ Therefore, a deed by her in the name she bore before marriage, and not

¹ *Cronise v. Clark*, 4 Md. Ch. 403; *begin v. Langley*, 39 Me. 200; *Heburn v. Chandler v. McKinney*, 6 Mich. 217. *Warner*, 112 Mass. 271.

² See *Walsh v. Young*, 110 Mass. 396, and cases cited; *Dill v. Bowen*, 54 Ind. 204.

³ *Savage v. Holyoke*, 59 Me. 345; *New-Concord Bank v. Bellis*, 10 Cush. (Mass.) 276.

disclosing this, although made with the fraudulent purpose of imposing upon the grantee, does not estop her from setting up title in the land as against the grantee.¹ Her sole deed is absolutely void.²

107. The equity doctrine in England of her liability for her contracts. — In England, and in some of our States, it has been held that the separate property of a married woman is answerable in equity for her debts and engagements to the full extent to which it is subject to her disposal. At a very early period in England it was held that a married woman, although incompetent at law to make a valid contract, would be regarded in equity as a *feme sole* in respect to her separate estate.³ “And the rule seems to have been universally recognized, where a married woman made an express contract respecting such an estate, of which she was entitled to the beneficial use, that she and the party with whom she contracted might have the aid of a court of equity to make the contract effectual.”⁴

Lord Thurlow⁵ carried the doctrine farther, and declared he had “no doubt about this principle, that if a court of equity says a *feme covert* may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements; as, for instance, for the payment of debts.” This subject and the English authorities upon it were fully examined by Lord Brougham,⁶ who arrives at the same result. “In all these cases,” he says, “I take the foundation of the doctrine to be this: The wife has a separate estate, subject to her own control and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discoverd. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly incumbered it. At first the court seems to have supposed

¹ Lowell v. Daniels, 2 Gray (Mass.), 161.

² Warner v. Crouch, 14 Allen (Mass.), 163.

³ Grigby v. Cox, 1 Ves. Sen. 517; Peacock v. Monk, 2 Ib. 190.

⁴ Per Hoar, J., in Willard v. Eastham, 15 Gray (Mass.), 328.

⁵ Hulme v. Tenant, 1 Bro. C. C. 16; and see same case in White & Tudor's Lead. Cas. in Eq. (Am. ed.) 324, and the authorities there collected.

⁶ In Murray v. Barlee, 3 Myl. & K. 209.

that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imparted to this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always of course considered as made in execution of it. But so, if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert*, without any reference to her separate estate, it was held, in the cases I have above cited, that she must have intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified

by a scrap of writing? No such distinction can be taken upon any conceivable principle."

108. **Equity enforces her contract on her general property.** — Lord Cottenham,¹ agreeing in the doctrine established, was of opinion that in the reason of it there is nothing which has any resemblance to the execution of a power. "What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the particular estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more logical. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

109. **The American courts do not carry the doctrine to this extent.** — As a general rule her separate estate is not chargeable with her debts or obligations not relating to her separate estate, unless she specially makes them a charge upon it by some instrument in writing. Her contracts, which do not concern her separate estate and are not made upon its credit, remain void as they were at common law. The statutes of the several states differ considerably in their effect upon her power to make contracts, and to charge herself and her real estate with them; but, as a general rule, equity, while holding it not to be answerable for any implied

¹ *Owens v. Dickenson*, Cr. & Phil. 48.

undertaking of hers, will enforce upon it her mortgage or other express contract, although it be not made for her benefit but for the sole benefit of another.¹

In a case in the Supreme Court of Massachusetts,² Mr. Justice Hoar, after a careful review of the authorities, said: "Our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

110. A married woman can bind herself personally only by such obligations as have reference to her separate property. — She is not bound, therefore, by a note given by her alone or jointly with her husband for a debt of the husband.³ The fact that the note is secured by a mortgage on her real estate does not make the note

¹ *Heburn v. Warner*, 112 Mass. 271; where the English and American cases *Willard v. Eastham*, 15 Gray (Mass.), 328; *Rogers v. Ward*, 8 Allen (Mass.), 387; *Young v. Graff*, 28 Ill. 20; *Yale v. Dederer*, 18 N. Y. 265; S. C. 22 N. Y. 451; *Owen v. Cawley*, 36 N. Y. 600; *Knowles v. McCamly*, 10 Paige (N. Y.), 342; *Gardner v. Gardner*, 7 Ib. 112; *Jaques v. Methodist Epis. Ch.* 17 Johns. (N. Y.) 548; *Curtis v. Engel*, 2 Sandf. (N. Y.) 287; *Cruger v. Cruger*, 5 Barb. (N. Y.) 227; *Ballin v. Dillaye*, 37 N. Y. 35; *White v. McNett*, 33 N. Y. 371; *White v. Story*, 43 Barb. (N. Y.) 124; *Ledlie v. Vrooman*, 41 Ib. 109.

² *Willard v. Eastham*, 15 Gray (Mass.), 328 at 335. In this case a note had been given by a married woman to her brother to establish him in business; but no mortgage or other charge upon her separate estate was given. Upon a bill in equity to charge it upon her estate, it was held that she was not liable, and the bill was dismissed. But in the later case of *Heburn v. Warner*, 112 Mass. 271, where a married woman, to enable her son to borrow money, gave her note, secured by mortgage of her separate estate, it was held that, while she was not liable upon the note, and the mortgage was void at law, yet in equity the mortgage should be enforced.

³ *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; *White v. McNett*, 33 N. Y. 371; *Ledlie v. Vrooman*, 41 Barb. (N. Y.) 109; *Burns v. Lynde*, 6 Allen (Mass.), 305, 313; *Athol Machine Co. v. Fuller*, 107

such an obligation respecting her separate estate as to render her liable upon it,¹ although the mortgage itself be in equity a valid and binding lien upon her separate property.²

Where a married woman is empowered by statute to bargain, sell, and convey her real estate or personal property, and enter into contracts in reference to it, she may deal with the property itself, by sale or otherwise, and all obligations assumed in connection therewith, as for buildings upon her own land; and she may bind herself to pay money for property purchased, as the property will become hers by the purchase, and the obligation to pay is held to be in reference to her separate property.³ But this is the limit of her power. She cannot contract as surety for her husband or for any one else. The character of a note or other contract made by her is not affected as a contract applying to her separate property by reason that it is secured by a mortgage on her land. The mortgage is collateral to the note; the one is the principal, the other the incident; when the note is void the mortgage is void also, and cannot be foreclosed at law.⁴

“In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure the payment of a note, the defendant may show the same matters of defence which he might show in defence of an action on the note;”⁵ excepting only that he cannot plead the statute of limitations.⁶

But a married woman may, with the proper assent of her husband, convey her separate real estate, and if there be a valid consideration for the conveyance, it is as effectual as it would be if she were not married. She may therefore convey her real estate in mortgage to secure a valid debt, as for instance, a valid note of her husband. Her mortgage is then binding, because it is a contract entered into by her in relation to her separate property, and to secure a valid and existing debt.

It does not matter that she has also signed her husband's note as surety. To a suggestion in such a case that the mortgage was void, because it was made to secure a note signed by a married

Mass. 437; Willard *v.* Eastham, 15 Gray (Mass.), 328; Heburn *v.* Warner, 112 Mass. 271.

¹ Williams *v.* Hayward, 117 Mass. 532.

² Thatcher *v.* Churchill, 118 Mass. 108.

³ Heburn *v.* Warner, 112 Mass. 271, and cases cited.

⁴ Brigham *v.* Potter, 14 Gray (Mass.), 522; Denny *v.* Dana, 2 Cush. (Mass.) 160.

⁵ Mr. Justice Metcalf, in Vinton *v.* King, 4 Allen (Mass.), 562.

⁶ Thayer *v.* Mann, 19 Pick. (Mass.) 535.

woman as surety, Chief Justice Bigelow said: ¹ "This might be a very sound argument if the note was signed by the married woman alone. In such case, the note being void, the demandant would not be entitled to judgment for possession. But the note is not void. It is a valid contract binding on the other promisors. It is therefore the ordinary case of the conveyance of real estate by a valid deed to secure the payment of debt due to the grantee." But when her mortgage is made to secure her own note given for the accommodation of her husband or any one else, the note being void, the security incident to it is void also. She can take the defence of invalidity in the same way that any mortgagor may defend on the ground of want of consideration, or of duress. Her defence at law to the note extends to the mortgage.

111. Liability for deficiency upon foreclosure.—The foregoing examination of the question, how far a married woman can bind herself individually by her contracts, is applicable to the question of her liability for a deficiency arising upon the foreclosure of a mortgage upon her estate. It has been noticed that while in equity the lien upon her estate may be valid, her note or other personal obligation secured may be wholly void.² Of course in such case, when the remedy has been exhausted against the mortgaged estate, there is no further remedy against her.³ If, for instance, she borrow money upon a mortgage of her real estate for the accommodation of her husband, and it is paid to him, she is under no liability for any deficiency after the application of the property to the repayment of the loan.⁴

¹ *Bardlett v. Bartlett*, 4 Allen (Mass.), 440.

² *Hcburn v. Warner*, 112 Mass. 271.

³ *Kidd v. Conway*, 65 Barb. (N. Y.) 158.

Prior to the statute of 1860, c. 90, it was held in New York that a married woman could not bind herself personally for the price of real estate bought by her and conveyed to her; *Knapp v. Smith*, 27 N. Y. 279; nor for the rent reserved upon a lease to her, though the lease itself was otherwise valid, and the lessor might re-enter. So a mortgage for the price of real estate conveyed to her was valid in equity, though the note or bond given in

connection with it was not. Since the above statute she can bind herself for any matter pertaining to her separate estate.

⁴ *White v. McNett*, 33 N. Y. 371; *Payne v. Burnham*, 62 N. Y. 69, reversing 2 Hun, 143; *Manhattan Brass & Manuf. Co. v. Thompson*, 58 N. Y. 80.

In New York, by Laws 1862, c. 172, § 7, it is provided that a married woman may be sued in any court, and a judgment recorded against her may be enforced against her sole and separate estate in the same manner as if she were sole. The effect of this statute is to give a legal remedy against her property generally for her debts, and not merely a remedy in

A married woman may bind herself personally for a loan made to her upon her mortgage of her real estate if the loan is for the benefit of her separate estate.¹ That the loan is for the benefit of her separate estate may appear by the mortgage, or may be shown by evidence.²

112. The English doctrine adopted in some states.—In some states, however, the English doctrine in equity, that a wife's separate property is liable generally for her debts, is followed.³ It is regarded as right that her property should pay her pecuniary engagements, whether they are made for her own benefit or not, and whether they are charged upon particular property or not. Neither does it matter whether her engagements be express or implied; whether they be in writing or by parol merely. Having the power to contract debts, and to bind her separate property for their payment, she is regarded as intending that her obligations shall be enforced according to their purport.

113. To secure debt of husband.—A married woman may make a valid mortgage of her separate property to secure the payment of the debt of her husband or of any other person, in the same manner as if she were unmarried.⁴ Any consideration which would be sufficient to support the obligation if made by any one else, as for instance the granting of the original loan, or a subsequent extension of the time of payment of the debt, is sufficient to

equity against her estate expressly charged with the payment of a debt for which she was not personally liable. *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *First Nat. Bank of Canandaigua v. Garlinghouse*, 53 Barb. (N. Y.) 615; *Andrews v. Monilaws*, 8 Hun (N. Y.), 65.

¹ *Payne v. Burnham*, *supra*.

² *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613.

³ 1 Bishop on Mar. Women, § 873; Schouler's Dom. Relations, 230; *Todd v. Lee*, 15 Wis. 365; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Wheaton v. Phillips*, 12 N. J. Eq. (1 Beas.) 221; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Glass v. Warwick*, 40 Penn. St. 140; *Cummings v. Sharpe*,

21 Ind. 331; *Webb v. Hoselton*, 4 Neb. 308; *Deering v. Boyle*, 8 Kans. 525, where the cases are fully examined; *Todd v. Lee*, 15 Wis. 365; *Heath v. Van Cott*, 9 Wis. 516; *Smith v. Wilson*, 2 Met. (Ky.) 235; *Johnston v. Ferguson*, *Ib.* 503; *Sharp v. Proctor*, 5 Bush (Ky.), 396; *Hobson v. Hobson*, 8 Ib. 665.

⁴ See cases cited in §§ 109, 110; also *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 144; *Fireman's, &c. v. Bay*, 4 Barb. (N. Y.) 407; *Robbins v. Abrahams*, 1 Halst. (N. J.) Ch. 465; *Iowa Code*, § 2506; *Low v. Anderson*, 41 Iowa, 476; *Smith v. Osborn*, 33 Mich. 410; *Short v. Battle*, 52 Ala. 456; *Comegys v. Clarke*, 44 Md. 108; *Plummer v. Jarman*, 44 Md. 632.

support her undertaking.¹ Whatever conflict there may be in the authorities as to the ability of a wife to charge herself personally for any debts not contracted for her own benefit, there is a general unanimity in holding that a mortgage upon her property may be enforced against that whether made for her benefit or not.

The mortgage of a married woman upon her property, given to secure a debt of her husband, but taken by the mortgagee in good faith and without fraud on his part, will seldom, if ever, be set aside, even on proof that her husband procured her execution of it by fraudulent representations.² A wife having executed a paper at the request of her husband, without reading it or inquiring as to the contents of it, although it was a mortgage of her property, the mortgagee having no knowledge of this fact, was not allowed to restrain the execution of it, on the ground that it was procured by fraud or deceit.³ But the court refused to enforce a mortgage, the execution of which by the wife was procured by harshness and threats on the part of the husband so excessive as to subjugate and control the freedom of her will.⁴

114. Surety for husband.—A wife who has mortgaged her separate property for her husband's debt is in the position of a surety,⁵ and her liability and the mortgage lien is discharged by an extension of the time of payment without her consent.⁶ Her rights in this respect are the same as if she were sole.

Moreover she is entitled to have her estate exonerated out of the estate of her husband if this be practicable.⁷ When he has mortgaged or pledged his own property for the same debt, his property should in the first instance be applied to satisfy the mortgage.⁸ The creditor having security upon the husband's property

¹ *Low v. Anderson*, *supra*; *Short v. Seranage*, 19 Iowa, 461; *Watson v. Thurber*, 11 Mich. 457; *Spear v. Ward*, 20 Cal. 659; *Ellis v. Kenyon*, 25 Ind. 134.

² *Spurgin v. Traub*, 65 Ill. 170.

³ *Comegys v. Clarke*, 44 Md. 108; and see *Freeman v. Wilson*, 51 Miss. 329.

⁴ *Central Bank of Frederick v. Cope-land*, 18 Md. 305.

⁵ *Hawley v. Bradford*, 9 Paige (N. Y.), 200; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Young v. Graff*, 28 Ill. 20; *Bartlett v. Bartlett*, 4 Allen (Mass.), 440; *Eaton v. Nason*, 47 Me. 132; *Green v.*

⁶ *Bank of Albion v. Burns*, 46 N. Y. 170; *Coleman v. Van Rensselaer*, 44 How. (N. Y.) Pr. 368; *Smith v. Townsend*, 25 N. Y. 479; *Spear v. Ward*, 20 Cal. 659; *White & Tudor Lead. Cas.* in Eq. (4th ed.) 1922, and cases cited.

⁷ *Wilcox v. Todd*, 64 Mo. 388; *Huntingdon v. Huntingdon*, 2 Bro. P. C. 1.

⁸ *Wilcox v. Todd*, *supra*; *Loomer v. Wheelright*, 3 Sandf. (N. Y.) Ch. 135;

for the payment of the same debt, by releasing this discharges the wife's estate.¹

The husband being the principal debtor, if he acquire the mortgage, it will be discharged.² Although the right of redemption be limited to him, she may nevertheless redeem, unless it appear from the instrument itself or from extraneous evidence that she intended to make a gift of the property to her husband, and that the conveyance, therefore, should be absolute.³

To make the mortgagee chargeable with the equitable rights of the wife, as surety for her husband, it must appear that he had notice of this relation. Such notice cannot be inferred merely from the fact that the money was paid to the husband, because he may have acted as his wife's agent in the transaction. But if the mortgage be made to secure a preëxisting debt of the husband's, the creditor is affected with notice of the wife's equity as surety, and in his dealings with the husband is bound by this knowledge.⁴

In Kentucky, however, it is held that a married woman, who mortgages her real estate to secure debts of her husband, does not thereby become a surety of her husband, and entitled to a discharge when seven years shall have elapsed without suit after the cause of action has accrued, under a statute to that effect. The security takes the obligation out of the statute, which is interpreted to refer only to one who becomes a surety of another in an ordinary bond or obligation.⁵

115. A husband has no presumptive authority to consent to an extension of a mortgage given by his wife to secure his debt. The holder of such a mortgage is chargeable with notice of her ownership, and that she stands in the relation of surety to the husband. The lien is therefore discharged by an extension of the time of payment without her concurrence.⁶

Sheidle v. Weishlee, 16 Penn. St. 134; *Johns v. Reardon*, 11 Md. 465; *Weeks v. Haas*, 3 W. & S. (Pa.) 520; *Knight v. Whitehead*, 26 Miss. 245; *Wright v. Austin*, 56 Barb. (N. Y.) 388; *Gahn v. Neimeewicz*, 3 Paige (N. Y.), 614; S. C. 11 Wend. 312.

¹ *Ayres v. Husted*, 15 Conn. 504; *Johns v. Reardon*, 11 Md. 465.

² *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29.

³ *Duffy v. Ins. Co.* 8 W. & S. (Pa.) 413, 433; *Demarest v. Wyncoop*, 3 Johns. (N. Y.) Ch. 129.

⁴ *Loomer v. Wheelright*, 3 Sandf. (N. Y.) Ch. 135; *Gahn v. Neimeewicz*, 3 Paige (N. Y.), 614; 11 Wend. 312; *Knight v. Whitehead*, 26 Miss. 245.

⁵ *Hobson v. Hobson*, 8 Bush (Ky.), 665.

⁶ *Bank of Albion v. Burns*, 2 Lans. (N. Y.) 52; *Smith v. Townsend*, 25 N. Y. 479.

116. May make a valid contract to assume a mortgage. — A married woman, in taking a conveyance of lands incumbered by a mortgage, may make a valid contract to assume the payment of it, and render herself liable to the mortgagee for a deficiency.¹ Such a contract is not an undertaking to pay the debt of another, but to pay her own debt for the benefit of her own estate. Having the capacity to make contracts for the acquisition of land, she must have the capacity of binding herself for the payment of the price of it. It is as much within her capacity to make an agreement to assume the payment of an existing mortgage, as it is to give a new mortgage and note for a part of the purchase money.

117. In Alabama a married woman cannot bind either herself or her statutory real estate, by a mortgage made to secure debts contracted by her husband.² Even a mortgage given by her in part payment of the purchase price of the land at the time of the conveyance to her is not binding upon her; but she may go into chancery and have the sale to her set aside, and the money she has paid on the purchase paid back to her.³ A sale made under a power in such mortgage is ineffectual, and the court may direct her debt to be held as a charge upon the land, and decree her

¹ *Huyler v. Atwood*, 26 N. J. Eq. 504; *Perkins v. Elliott*, 23 Ib. 533; *Carpenter v. Mitchell*, 54 Ill. 126; *Ballin v. Dillaye*, 35 How. (N. Y.) Pr. 216; S. C. 37 N. Y. 35; *Flynn v. Powers*, 35 How. (N. Y.) Pr. 279; S. C. 36 Ib. 289; *Vrooman v. Turner*, 8 Hun (N. Y.), 78.

An earlier case in the Supreme Court of New York held that a married woman was not liable in such case, because a purchase which turned out so poorly — the property not being worth the amount of the mortgage covenant — could not be for the benefit of her separate estate. *Brown v. Hermann*, 14 Abb. (N. Y.) Pr. 394.

² *Davidson v. Lanier*, 51 Ala. 318; *Wilkinson v. Cheatham*, 45 Ala. 337; *Cowles v. Marks*, 47 Ala. 612; *Northington v. Faber*, 52 Ala. 45; *Fry v. Hamner*, 50 Ala. 52; *Riley v. Pierce*, 50 Ala. 93.

Code, 1867, §§ 2371, 2372, 2376. All property of the wife, held by her previous to the marriage, or which she may become

entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband. Property thus belonging to the wife vests in the husband as her trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs, or legal representatives, for the rents, income, and profits thereof; but such rents, income, and profits are not subject to the payment of the debts of the husband. For all contracts for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable.

³ *Cowles v. Marks*, *supra*. "One who deals with a married woman in this state about her property must take notice of her powers and her disabilities." Per Peters, J.

money to be paid back to her, within a reasonable time; or in the event of failure, that the land be sold, and her debt paid out of the proceeds of such sale; but she would be held to account for the rents and profits received during her occupation of the land.¹

A distinction is taken between the statutory real estate of a married woman, and that which is her equitable separate estate; and such an equitable separate estate may be created when the gift, or devise, or conveyance to her, clearly and certainly shows an intent to exclude the marital rights of the husband under the statute. Such separate estate not affected by the statute she can mortgage for her own debt or that of any one else.²

A mortgage of a married woman's statutory separate estate, executed by herself and husband to secure the payment of their joint promissory note, is not binding upon her estate, not being bound for the debt. The consideration of the note may be shown by parol to have been the indebtedness of the husband.³ But if the contract of purchase was made by the husband alone, though the conveyance was taken in the name of his wife, and the vendor had no notice of the wife's claim to the money, his equity under the mortgage is regarded as superior to hers.⁴

118. In Mississippi a married woman can make contracts binding her separate property only for certain purposes. In general, it may be said that she has no power to borrow money by mortgaging her real estate; but if the lender can show that the money was actually applied to discharge a debt for which her separate estate was already bound, or to make purchases for which she might charge her estate, then the lender may recover upon the property mortgaged. She cannot bind the corpus of her property to pay her husband's debt:⁵ it being provided by statute that "no conveyance or incumbrance for the separate debts of the husband shall be binding on the wife, beyond the amount of her income."⁶ Although such a mortgage may be operative on her

¹ *Cowles v. Marks*, *supra*; *Short v. Battle*, 52 Ala. 456. See *Haygood v. Marlowe*, 51 Ala. 478, as to effect of deed and simultaneous mortgage for purchase money.

² *Short v. Battle*, 52 Ala. 456.

³ *Stribling v. Bank of Kentucky*, 48 Ala. 45.

⁴ *Haygood v. Marlowe*, 51 Ala. 478.

⁵ *Viser v. Scruggs*, 49 Miss. 705; *Freeman v. Wilson*, 51 Miss. 329; and see *Dibrell v. Carlisle*, 51 Miss. 785.

⁶ Code, 1871, § 1778.

estate to that extent, it ceases to be operative upon it in any way upon her death.¹

4. *Tenants in Common of Partnership Real Estate.*

119. Generally. — Land conveyed to members of a copartnership as tenants in common, but purchased with copartnership funds and used for copartnership purposes, is treated in equity as copartnership property. The creditors of the copartnership are in such case entitled to priority of payment out of it in preference to the creditors of individual members of the firm.² But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as for instance for a loan of money, the mortgagee having no notice of the character of the property in equity as copartnership property, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record.

But a mortgagee as to the interest he holds is a purchaser, and if he take a mortgage upon partnership real estate without notice that it is such, he is subject to no equity in favor of the partnership or of its creditors.³

120. Notice of partnership equities. — A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts. The mortgage is not available until the partnership debts have been paid and the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority;⁴ or if creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.⁵ There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.⁶ Upon the

¹ Reed v. Coleman, 51 Miss. 835.

³ Hewitt v. Rankin, 41 Iowa, 35.

² Pollock's Dig. of Law of Partnership;

⁴ Beecher v. Stevens, 43 Conn. 587.

Story on Partnership, §§ 92, 93; Hewitt v.

⁵ Lovejoy v. Bowers, 11 N. H. 404;

Rankin, 41 Iowa, 35; Buchan v. Sumner,

French v. Lovejoy, 12 N. H. 458.

2 Barb. (N.Y.) Ch. 165; Meily v. Wood,

⁶ Lovejoy v. Bowers, *supra*.

71 Pa. St. 488.

bankruptcy of the firm, the assignee, in behalf of the creditors, would be entitled to the property in preference.

If one partner, upon retiring from the partnership, conveys his interest in the partnership real estate to another person, who then comes in and forms a new firm, and this new partner executes a mortgage of such real estate to secure the purchase money, in the absence of any evidence that the mortgage was intended to be a mortgage of this partner's interest in the new firm, it is proper to regard it as a mortgage of the same partnership interest in the old firm which was conveyed to the new partner, and not of his interest in the new firm. Such a mortgage is subject to the payment of the debts of the old firm, but not to the payment of the debts of the new firm.¹

But he must be in the position of a *bonâ fide* purchaser for value; he must have parted with money or goods, or something valuable, in reliance upon the security. If he has simply taken the mortgage to secure an existing debt, or has knowledge of the facts which make the property in equity assets of the firm, then his mortgage will be postponed to the equities of those who have a right to have the property applied as assets of the copartnership.²

A mortgage by one partner of his interest in a mill and machinery in the continued use and occupation of the partnership, to secure such partner's individual debt, passes only what interest such partner may have, after paying the debts of the copartnership.³ The continued use of such property by the partnership is notice of the equitable rights of the partnership in the property.

121. Mortgage of partnership property by one partner for partnership debt. — Where a copartnership carried on business in a store built by the firm upon land, the legal title of which was in A., and one of his copartners, to secure a partnership debt, executed a mortgage of the land with the consent of his copartners, and in the firm name of A. & Co., and acknowledged the execution of it "as his free act and deed in behalf of said firm," it was held valid as against a person who, with actual notice of this, took a subsequent mortgage of the same property executed by A.⁴

¹ Beecher v. Stevens, 43 Conn. 587.

² Hiscock v. Phelps, 49 N. Y. 97.

³ Mechanics' Bank v. Godwin, 5 N. J. Eq. (1 Halst.) 334.

⁴ Wilson v. Hunter, 14 Wis. 683.

An exception to the general rule, that an authority to bind another by an instrument under seal must itself be created by a like instrument, seems to have been established in the case of partners; they may give each other authority by parol, to bind each other by instruments under seal.¹ Some of the cases cited do not refer to conveyances of real estate. But if authority to execute a personal contract under seal may be implied from this relation, the same authority may as well extend to conveyances of real property. Lord Kenyon said, that if the relation of partnership gave this authority in the one case, it "would extend to the case of mortgages."²

An unauthorized mortgage of partnership property made by one partner using the name of his copartner may be ratified by the latter by parol, or by any act showing his recognition of the mortgage.³ A mortgage of such real estate by one partner to secure a copartnership debt is valid;⁴ but it is not valid if made in opposition to the will of another partner with the knowledge of the creditor.⁵

122. On the other hand, if a partner mortgage his separate property to secure a partnership debt, he becomes a surety for the firm, and his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.⁶

123. Upon the death of a partner holding such an interest in partnership real estate, his share descends to his heirs, but equity converts the legal title into a trust, to be devoted to the payment of partnership obligations, before it can be taken as a part of his separate estate.⁷ As against the partnership creditors there can be no dower in such land. But when such real estate is not required for the payment of the partnership debts, or the adjustment of balances between the partners, it is to be treated

¹ See *Wilson v. Hunter*, *supra*; *Cady v. Sheperd*, 11 Pick. (Mass.) 400; *Swan v. Stedman*, 4 Met. (Mass.) 548; *Smith v. Kerr*, 3 N. Y. 144.

² *Harrison v. Jackson*, 7 T. R. 207.

³ *Holbrook v. Chamberlin*, 116 Mass. 155.

⁴ *Cooley v. Hobart*, 8 Iowa, 358.

⁵ *Bull v. Harris*, 18 B. Mon. (Ky.) 195.

⁶ *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

⁷ *Wilcox v. Wilcox*, 13 Allen (Mass.), 252; *Burnside v. Merrick*, 4 Met. (Mass.) 537; *Dyer v. Clark*, 5 Ib. 562; *Howard v. Priest*, Ib. 582.

as realty in the settlement of the estate, and is subject to dower. It is then treated in every way as real estate, and does not go to the personal representatives of the deceased. It is to be regarded as real estate and subject to all the rules applicable to real estate.¹ The conversion of such real estate into personalty, for the purpose of the settlement of the partnership affairs, is a device of equity; and as soon as the reason of the rule ceases, by the closing of the partnership affairs without calling upon the real estate, the rule itself no longer applies.² This equitable interference is not extended so as to convert all real estate into personalty for the purpose of a division.

A mortgage by an individual partner of such real estate is relieved of all equities in favor of the partnership, so soon as the business of the partnership is closed, without requiring the application of it to the firm debts.³

5. Corporations.

124. A corporation has the power to mortgage its real estate as an incident to the power to acquire and hold it, and to make contracts in regard to it, when the power is not expressly given or denied.⁴ The *jus disponendi* of corporations is at common law unlimited. This right may of course be circumscribed by statute, or by the acts under which they are organized; and it is the case generally that corporations, to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantage, are restrained in their power of alienation either by general law or by their charters. Railroad companies are of this class; and accordingly, under such restraining laws, it is held that a railroad corporation cannot mortgage its franchise without legislative authority;⁵ that it has no power to issue bonds and make mortgages to secure them except in the mode and for the purposes authorized by statute,

¹ Foster's Appeal, 74 Pa. St. 391; Wilcox v. Wilcox, *supra*; Hewitt v. Rankin, 41 Iowa, 35, and cases cited.

² Judge Story says, in his work on Partnership, § 93, that this is an open question. But the authorities now seem decisive of the law as stated in the text.

³ Hewitt v. Rankin, *supra*. See, also,

Shearer v. Shearer, 98 Mass. 107, for an able opinion by Mr. Justice Wells.

⁴ Aurora Ag. & Hort. Soc. v. Paddock, 80 Ill. 263; and see Angell & Ames on Corp. 153.

⁵ Atkinson v. Marietta, &c. R. Co. 15 Ohio St. 21; Coe v. Columbus, &c. R. Co. 10 Ohio St. 372; Commonwealth v. Smith, 10 Allen (Mass.), 448.

either in express terms or by reasonable implication.¹ Authority given to railroad corporations to mortgage their "corporate property and franchises," to secure the payment of debts contracted for certain purposes,² confers the right to mortgage all the rights and interests of a railroad company, with all its rights and interests acquired, and to be acquired, as an entirety.³ Authority to a railroad company to transfer all its property, rights, privileges, and franchises to another railroad company renders valid a mortgage to that company of a portion of the road and franchise.⁴

When an unauthorized mortgage has been made by a railroad corporation of its corporate franchise, a judicial sale under the mortgage does not invest the purchaser with any corporate capacity whatever.⁵ But an unauthorized mortgage, or one defectively executed, or securing bonds not properly drawn, may be subsequently confirmed by the legislature.⁶

The right of a railroad company to construct a road, being given because of the benefit to the public arising from the use of the road, a power conferred upon it to mortgage its property is construed to confer upon the mortgagee, or a purchaser under the mortgage, all needful authority to use the road in a proper and beneficial manner, but no authority to take up and sell the material of which the road is made.⁷

125. Limitation of power to mortgage does not apply to lands not necessary for the business of the road. — But this limitation of the power of a railroad corporation to mortgage its real estate does not apply to lands not acquired to enable it to carry on the business which it was chartered to do for the benefit of the public, and not needed or used for that purpose. The alienation of such lands in nowise impairs or affects the usefulness of the company as a railroad corporation, or its ability to

¹ *East Boston, &c. R. Co. v. Hubbard*, 10 Allen (Mass.), 459, note; *Richardson v. Sibley*, 11 Allen (Mass.), 65.

² New York General Railroad Act of 1850, § 28, subd. 10.

³ *Seymour v. Canandaigua & Niagara Falls R. Co.* 25 Barb. (N. Y.) 284.

⁴ *East Boston, &c. R. Co. v. Eastern R. Co.* 13 Allen (Mass.), 422; for other cases

of mortgages by consolidated roads, see *Wright v. Bundy*, 11 Ind. 398; *Bath v. Miller*, 51 Me. 341.

⁵ *Atkinson v. Marietta, &c. R. Co.* 15 Ohio St. 21.

⁶ *Chapin v. Vermont, &c. R. Co.* 8 Gray (Mass.), 575; *Shaw v. Norfolk County R. Co.* 5 Ib. 162.

⁷ *Palmer v. Forbes*, 23 Ill. 301.

exercise any of its corporate franchises. Mr Justice Foster, of Massachusetts,¹ in a case involving this point, said: "The recent cases in which railroad mortgages have been adjudged invalid by this court do not countenance any doubt of the power of a railroad company to sell and convey whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and maintain a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, in consideration of which its chartered privileges have been conferred."

If a mortgage by a railroad company include lands which it can mortgage without distinct legislative authority, and also lands which it cannot convey without such authority, the mortgage will be upheld as to the former, but will be inoperative and void as to the latter.²

126. A religious corporation has in general, under our laws, the same right to mortgage and create liens upon its real estate that any corporation has. Having the power to hold and enjoy real estate, unless there be an express prohibition, it has the power to mortgage it.³

127. The power to mortgage resides primarily in the body corporate, or otherwise in the stockholders. They may authorize the execution of it by any agents they may by special vote, or general by-law, constitute for that purpose. The directors of a corporation, without authority either expressly or impliedly derived from the stockholders, have no right to execute a mortgage, or to authorize any one to do so. But even if the directors exceed their authority in borrowing money for the corporation, and executing a mortgage to secure the repayment of it, the corporation cannot, after enjoying the benefit of the loan, and acquiescing in the transaction, question their authority. The stockholders may restrain the directors, or other officers, in any attempt to transcend their powers; but if they remain silent, and permit them to make

¹ *Hendee v. Pinkerton*, 14 Allen (Mass.), 381.

² *Hendee v. Pinkerton*, *supra*.

³ *Madison Av. Ch. v. Oliver St. Ch.* 41, N. Y. Superior Ct. 369; and see *Walrath v. Campbell*, 28 Mich. 111.

contracts, or execute mortgages upon their property, and receive the benefits of the loan, they will be estopped to say that the officers were not authorized to do these acts.¹

A by-law of a corporation providing that in the management of its affairs the directors shall have all the powers which the corporation itself possesses invests them with power to borrow money, issue bonds, or to convey in mortgage the lands of the corporation as security.²

The authorities are quite decisive, however, that the directors of a corporation, in the absence of any restriction by charter or by-law, may, in behalf of the corporation, mortgage its property to secure any debts they are authorized to incur, without express authority.³

A corporation ratifies a mortgage made by its directors by issuing bonds under it, and paying interest upon them.⁴ The ratification may be through any acts which show that the corporation accepts the acts of its officers or agents.⁵

128. Must use corporate seal. — A corporation cannot make a valid mortgage of its real estate except by an instrument under its corporate seal.⁶ But an impression of the seal of a corporation stamped upon and into the substance of the paper upon which the instrument is written is a good seal, although no wax, wafer, or other adhesive substance be used.⁷ This is so held in states where

¹ *Aurora Agr. & Hort. Soc. v. Paddock*, 80 Ill. 263; *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336; *Bradley v. Ballard*, 55 Ill. 413.

² *Hendee v. Pinkerton*, 14 Allen (Mass.), 381.

³ *Hendee v. Pinkerton*, *supra*, per Foster, J.; *Bank of Middlebury v. Rutland, &c. R. Co.* 30 Vt. 159, 169; *Miller v. Rutland, &c. R. Co.* 36 Vt. 452, 474; *Sargent v. Webster*, 13 Met. (Mass.) 497, 503; *Barrill v. Nahant Bank*, 2 Met. (Mass.) 163; *Augusta Bank v. Hamblet*, 35 Me. 491; *Hoyt v. Thompson*, 19 N. Y. 207. See *Forbes v. San Rafael Turnpike Co.* 50 Cal. 340, where the power of the directors was limited.

⁴ *McCurdy's Appeal*, 65 Pa. St. 290.

⁵ *Holbrook v. Chamberlin*, 116 Mass. 155, and cases cited.

⁶ *In re St. Helen Mill Co.* 3 Sawyer, 88; *Eagle Woollen Mills Co. v. Monteith*, 2 Oregon, 285.

⁷ *Hendee v. Pinkerton*, 14 Allen (Mass.), 381. "After our own courts have allowed wafers instead of wax, and paper, with gum or mucilage, instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of an impression of a corporate seal on the paper itself. The extent to which this practice has prevailed among corporations; the fact that the seals of all our own courts have been from an early period of the same description; the sanction of numerous decisions in other states, and in the federal courts; the convenience and unobjectionable character of the usage, are arguments in its favor too powerful to be resisted, in the absence of any decisive authority to the

the distinction between sealed and unsealed instruments is inflexibly preserved. But where a scroll is not treated as a seal, a facsimile of the seal of a corporation printed with ink on the paper has been adjudged not to be a valid seal.¹ "No definition of a seal has ever been made," says Mr. Justice Foster,² "and none can be suggested, liberal enough to include the method adopted in that case, which would not destroy the distinction uniformly adhered to in the usage and judicial decisions of this state. If we should pronounce every scroll a seal, we should speedily be called upon to take the next step of pronouncing every flourish to be a scroll, and nothing would remain of the ancient formality of sealing."

4. *A Power to Mortgage.*

129. A general power to sell does not include power to mortgage. — As a general rule, a power to sell and convey real estate does not confer a power to mortgage, and a mortgage executed under a power of attorney, authorizing the attorney to sell and convey only, is void.³ The power should expressly declare the intention that the agent should have the authority to mortgage the property. A general power may be sufficient if it appears that the principal intended his agent should have authority to raise money on mortgage, and the nature of the business intrusted to him is such as to make it proper for him to exercise this power.⁴ A power to sell for the expressed purpose of raising money is held to imply a power to give a mortgage which is only a conditional sale.⁵

contrary." Per Foster, J. And see article 1 Am. Law Rev. 638, by Geo. S. Hale, Esq.

¹ Bates v. Bolton & N. Y. Cent. R. Co. 10 Allen (Mass.), 251.

² In Hendee v. Pinkerton, 14 Allen (Mass.), 381.

In Rauch v. Oil Co. 8 W. Va. 36, a deed of trust reciting a corporation as the grantor, but having the following attestation: "Witness the signature and seal of William Scott, president of said Blennerhassett Oil Co., and who is legally authorized by the board of directors of said company to make this grant, this date aforesaid. William Scott (Seal);" the corporate seal not being used, was held not to be the deed of the corporation.

³ De Bouchout v. Goldsmid, 5 Ves. 210;

Australian, &c. Co. v. Mounsey, 4 K. & J. 733; Bloomer v. Waldron, 3 Hill (N. Y.), 361; Morris v. Watson, 15 Minn. 212.

Otherwise in Pennsylvania. Lancaster v. Dolan, 1 Rawle (Pa.), 231; Zane v. Kennedy, 73 Pa. St. 182; Lancaster v. Dolan, 1 Rawle (Pa.), 231; Presbyterian Corporation v. Wallace, 3 Rawle (Pa.), 109; Gordon v. Preston, 1 Watts (Pa.), 386; Duval's Appeal, 38 Pa. St. 118; Penn. Life Ins. Co. v. Austin, 42 Pa. St. 257.

⁴ See Coutant v. Servoss, 3 Barb. (N. Y.) 128.

⁵ Powell on Mortg. c. 4; Mills v. Banks, 3 P. Wms. 7; Page v. Cooper, 16 Beav. 396; Earl of Oxford v. Albemarle, 17 L. J. N. S. Ch. 396.

A power by will, or otherwise, to raise a sum of money upon certain land authorizes either an absolute sale, or a mortgage, as may be deemed expedient.¹

A power to mortgage given in general terms, without specifying the provisions the deed shall contain, includes the power to make it in the form and with the provisions customarily used in the state or country where the land is situated. Thus such a power to mortgage given in England, or perhaps in some American States, would authorize the giving of a mortgage with a power to sell;² while in other states, in which these powers are not in general use, a power inserted without special authority would be void. And in regard to other provisions, as for instance that forfeiting credit on the mortgage upon any default in the payment of interest, and giving the mortgagee the option thereupon to consider the whole sum due, a general power to mortgage would authorize its use in some states, while the same power would not authorize it in others.³

130. Mode of exercising the power.—It is an established rule of conveyancing that a deed by an attorney or agent must be executed in the name of the principal. In *Combe's case*,⁴ "it was resolved that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority."

A mortgage by a corporation must be executed in its name by the agent or officer authorized to act for it in this way. Although it may purport in the body of it to be the mortgage of a corporation, yet if executed by its attorney or officer in his individual name, it is not the legal mortgage of the corporation, and does not bind it except in equity.⁵

Although not bound by the act of an agent in giving a mortgage, the principal may ratify it by taking the benefit of it, or he

¹ *Wareham v. Brown*, 2 Vern. 153.

Mercantile Ins. Co. 6 Pick. (Mass.) 198;

² See chapter xl.; *Wilson v. Troup*, 7 Johns. (N. Y.) Ch. 25; S. C. 2 Cow. 195.

Elwell v. Shaw, 16 Mass. 42.

³ See § 76; *Jesup v. City Bank of Racine*, 14 Wis. 331.

⁵ *Love v. Sierra Nevada, &c. Mining Co.* 32 Cal. 639; and see *Brinley v. Mann*, 2 Cush. (Mass.) 337; *Sargent v. Webster*,

⁴ 9 Coke, 75; and see *Copeland v.*

13 Met. (Mass.) 497.

may in other ways so act with reference to the exercise of the power as to preclude himself from attempting to invalidate the security.¹

PART II.

WHO MAY TAKE A MORTGAGE.

131. In general any one capable of holding real estate may be a mortgagee.—The disabilities which prevent the making of a valid mortgage in no case prevent the taking of a mortgage, which is for the benefit of the mortgagee. An infant may take a mortgage. He is bound by the conditions of the deed, which must be wholly good or void altogether.²

132. Aliens.—In the United States aliens are generally empowered to hold real estate. But aside from any statutory privilege, a mortgage being regarded as a personal interest, the debt the principal thing, and the land merely as an incident, an alien was held entitled to hold and enforce a mortgage.³

133. A married woman may at common law be a mortgagee; but she cannot enforce a foreclosure of a mortgage of which the equity of redemption is held by her husband, either by suit at law or in equity, or by entry to foreclose in the presence of two witnesses. Though her title as mortgagee still continues, she is debarred from all proceedings to foreclose the mortgage during the continuance of the marriage relation.⁴

134. A corporation, though not expressly authorized by its charter or by statute to take a mortgage, if not prohibited may do so, provided only it be in furtherance of the objects for which it was created.⁵ A railroad company, when not forbidden to take anything but money in payment for its stock, may take mortgages of real estate securing notes or bonds given for the stock.⁶

¹ *Perry v. Holl*, 2 Gif. 138; 2 De G., 590; *Madison, &c. Plank Road Co. v. Wattertown, &c. Plank Road Co.* 5 Wis. 173.

² *Parker v. Lincoln*, 12 Mass. 16.

³ *Hughes v. Edwards*, 9 Wheat. 489.

⁴ *Tucker v. Fenno*, 110 Mass. 311.

⁵ *Gordon v. Preston*, 1 Watts (Pa.), 385; *Jackson v. Brown*, 5 Wend. (N. Y.)

⁶ *Clark v. Farrington*, 11 Wis. 306;

Blunt v. Walker, *Ib.* 334; *Cornell v.*

Hickens, *Ib.* 353; *Lyon v. Ewings*, 17

Wis. 61; *Andrews v. Hart*, *Ib.* 297; *Wes-*

tern Bank of Scotland v. Tallman, *Ib.* 530.

A bank organized under the national banking act¹ is authorized to take and hold a mortgage of real estate by way of security for debts previously contracted ;² but it cannot take such a mortgage as security for a debt contracted at the time or for future advances. Such a mortgage is invalid.³ Where a bank holds a mortgage upon land already, and for its own protection pays the amount of a prior lien, and then takes a mortgage for this sum, the transaction does not come within the prohibition of the statute as to taking mortgages for debts concurrently created.⁴

Where a state bank was authorized to hold mortgages, but it was provided by statute that all conveyances of real estate should be made to the president of the bank, it was held that a mortgage directly to the bank was valid notwithstanding ;⁵ for it was considered that the object was not to prohibit the bank from taking title, but merely to facilitate business by permitting conveyances to be made for the benefit of the bank to an officer of it.

135. Joint mortgagees. — A mortgage given to secure a joint debt creates a joint estate in the mortgagees.⁶ In case of the death of one of such mortgagees, an action to recover the debt or to enforce the mortgage may be maintained in the name of the survivor.⁷ But a mortgage given to two or more persons to secure their several debts is several and not joint ; each mortgagee has a right to enforce his claim under the mortgage, in a form adapted to the case, and of course the surviving mortgagee cannot maintain an action on the mortgage to enforce payment of the debt due the deceased mortgagee.⁸ Such a mortgage does not constitute the mortgagees trustees one for the other, at least before the law day.⁹

¹ 1864, June 3, §§ 8, 28.

² *Allen v. First Nl. Bk. of Xenia*, 23 Ohio St. 97.

³ *Kansas Valley Bank v Rowell*, 2 Dill. 371.

⁴ *Ornn v. Merchants' Nl. Bank*, 16 Kans. 341.

⁵ *Kennedy v. Knight*, 21 Wis. 340.

⁶ *Appleton v. Boyd*, 7 Mass. 131.

In Massachusetts, mortgages are expressly excepted from the provision of statute that conveyances made to two or

more persons shall be construed to create estates in common. Gen. Stat. c. 89, § 14. It leaves the nature of the estate open to inquiry.

⁷ *Blake v. Sanborn*, 8 Gray (Mass.), 154 ; *Webster v. Vandeventer*, 6 Ib. 428.

⁸ *Gilson v. Gilson*, 2 Allen (Mass.) 115, 117 ; *Burnett v. Pratt*, 22 Pick. (Mass.) 556 ; *Brown v. Bates*, 55 Me. 520.

⁹ *Bates v. Coe*, 10 Conn. 280, 293.

But whether the debt secured be joint or several, after foreclosure the mortgagees become tenants in common of the land.¹

A mortgage to husband and wife upon the death of the husband vests in the wife.²

A mortgagee of an undivided half of a parcel of land does not become a tenant in common with the owner of the other half. until his title has become absolute by a completed foreclosure. Before that time the mortgage is only a lien, and the estate is to be dealt with as belonging to the mortgagor.³

¹ *Goodwin v. Richardson*, 11 Mass. 469 ;
Randall v. Phillips, 3 Mason, 378 ; *Don-*
nells v. Edwards, 2 Pick. (Mass.) 617 ; *Bur-*
nett v. Pratt, *supra*.

² *Draper v. Jackson*, 16 Mass. 480.

³ *Norcross v. Norcross*, 105 Mass. 265,
and cases cited.

CHAPTER IV.

WHAT MAY BE THE SUBJECT OF A MORTGAGE.

1. *Existing Interests in Real Property.*

136. Every kind of interest in real estate may be mortgaged if it be subject to sale and assignment.¹ It does not matter that it is a right in remainder or reversion, a contingent interest, or a possibility coupled with an interest, if it be an interest in the land itself.² But an interest in the proceeds of land ordered to be sold and distributed among legatees is not a subject of mortgage.³ A mere personal right or interest, as for instance a right of preëmption of public lands, is of course not susceptible of mortgage;⁴ yet the land subject to preëmption may be mortgaged.⁵

The Code of California states the general rule of law upon this subject, in the provision that any interest in real property which is capable of being transferred may be mortgaged.⁶

Such, for instance, is the interest of one who holds a bond for title;⁷ and even the interest of one in possession under a parol contract to purchase;⁸ or the interest of the holder of school certificates until forfeited by non-fulfilment of the conditions of sale,⁹ or of a certificate of stock in an unincorporated company representing an interest in real estate.¹⁰

A mere possibility or expectancy, not coupled with any interest in or growing out of the property, cannot be made the subject of a mortgage.¹¹ A mere expectancy of acquiring property, without

¹ *Neligh v. Mechenor*, 11 N. J. Eq. 539; *Miller v. Tipton*, 6 Blackf. (Ind.) 238.

² *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *John v. Nut*, 19 Wend. (N. Y.) 659.

³ *Gray v. Smith*, 3 Watts (Pa.), 289.

⁴ *Penn v. Ott*, 12 La. Ann. 233; *Gilbert v. Penn*, 12 La. Ann. 235; *Broussard v. Dugas*, 5 La. Ann. 585.

⁵ *Whitney v. Buckman*, 13 Cal. 536.

⁶ Civil Code, § 2947.

⁷ *Baker v. Bishop Hill Colony*, 45 Ill. 264.

⁸ *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Bull v. Sykes*, 7 Wis. 449.

⁹ *Mowry v. Wood*, 12 Wis. 413; *Dodge v. Silverthorn*, 12 Wis. 644; *Jarvis v. Dutcher*, 16 Wis. 307.

¹⁰ *Durkee v. Stringham*, 8 Wis. 1.

¹¹ *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

a present interest in it, is not a subject of sale, and therefore not of mortgage. "The next cast of a fisherman's net" has long been used as an illustration of a mere expectancy, not the subject of grant. In a late case in Massachusetts it was sought to substantiate such a sale, and the court were obliged to adjudge that a man has no salable interest in halibut in the sea. There is a possibility, they say, the man may catch halibut, but he has no actual or potential interest in the fish until he has caught them.¹

137. An estate tail may be mortgaged by the life tenant. — Such tenant cannot prejudice the rights of the remaindermen, but can convey whatever interest he has.² A contingent or possible interest may also be the subject of a mortgage.³ Reversions and remainders, being capable of assignment, may be the subject of a mortgage.⁴

138. A mortgage passes the interest of the mortgagor whatever it may be. — When a mortgage is made of an estate or interest already incumbered in any manner, the mortgage of course attaches only to the interest then remaining in the mortgagor. Upon the discharge of any prior incumbrance, the mortgage interest has the full advantage of the discharge. If the mortgagor acquires any title after making the mortgage, that, as a general rule, accrues to the benefit of the mortgage title.

Unless the conveyance in mortgage be limited in its operation it passes all the interest the mortgagor has in the property embraced in it. It passes any reversionary interest he has; for instance, a mortgage of land subject to a homestead right conveys the reversionary interest after the expiration of the homestead estate, although the wife did not join in it.⁵ If there be an outstanding contract of sale of which notice is imparted by the record or by the vendee's possession, the mortgage is subject to the vendee's right to purchase; and upon a foreclosure and sale under the mortgage, the purchaser takes the property subject to the same right.⁶

¹ *Low v. Pew*, 108 Mass. 347. The other maxim (not of the law) is applicable: "First catch your fish," &c.

² *Hosmer v. Carter*, 68 Ill. 98. The limitation was to "her body heirs."

³ *Wilson v. Wilson*, 32 Barb. (N. Y.) 328.

⁴ 2 Story Eq. Jur. § 1021; *Curtis v. Root*, 20 Ill. 522.

⁵ *Smith v. Provin*, 4 Allen (Mass.), 516.

⁶ *Lavery v. Moore*, 33 N. Y. 658.

A mortgage may be made of any imperfect title which the mortgagor has, as for instance an imperfect Spanish title which was subject to sale and assignment.¹

A clause in a mortgage, "excepting therefrom so much of said tracts as have been conveyed by the mortgagor by deed to different individuals," does not reserve from the operation of the mortgage a portion of the premises covered by a prior unrecorded mortgage.²

A mortgage of several lots of land described by numbers on a plan, and by courses and distances, will pass all the title the mortgagor has in the lots, although he has only a mortgage title to one of them.³ But where a mortgagor became the husband of the mortgagee, and the two joined in a second mortgage of the premises to secure a prior debt of the husband, it was held that the wife's interest under the first mortgage was not thereby affected. She had not joined in the mortgage to assign her own mortgage, but to effectually pass the equity of redemption.⁴ So a mortgage of all the land and right and claim to land which the grantor has in a certain town does not include land to which he has only a possibility of a reversion on the non-performance of a condition subsequent.⁵

139. Mortgage of a mortgagee.—One may mortgage an interest in real estate which he himself holds in mortgage.⁶ He conveys all the interest he has; and if he afterwards acquire an absolute title, the second mortgagee by foreclosing his mortgage acquires an absolute estate.⁷

140. A mortgage may be made of rents due under a lease, and although a right of entry be given to the mortgagee the mortgage is a mere security, like any other mortgage of real estate, and the mortgagor remains the real owner until foreclosure and sale.⁸ A mortgage may be made of a ditch for mining purposes, the grantee having authority to collect the rents and profits of it.⁹

¹ *Massey v. Papin*, 24 How. 362.

² *Eaton v. White*, 18 Wis. 517.

³ *Murdock v. Chapman*, 9 Gray (Mass.), 156.

⁴ *Power v. Lester*, 23 N. Y. 527.

⁵ *Richardson v. Cambridge*, 2 Allen (Mass.), 118.

⁶ *Cutts v. York Manf. Co.* 18 Me. 190.

This point was not before the court.

⁷ *Murdock v. Chapman*, 9 Gray (Mass.), 156. See *Power v. Lester*, 23 N. Y. 527.

⁸ *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁹ *Kidd v. Teeple*, 22 Cal. 255.

141. A mortgage given by one part owner of land upon purchasing the remaining portion, which describes the whole parcel, is construed to embrace the entire interest, and not merely the undivided interest conveyed by the mortgagee.¹

The owner of certain land having conveyed an undivided half of it by a deed fully describing it, afterwards conveyed the remaining undivided half to the same grantee, and received from him at the same time a mortgage conveying "the following real estate in Stamford: viz., the same and all the real estate described in the deed of the said grantor to me dated Nov. 18, 1847," being the first named deed. The mortgage was construed to cover the whole title and interest acquired by the mortgagor by the two deeds, and not merely the undivided half conveyed to him by the former deed.²

A mortgage by a tenant in common of a moiety of the land passes only his interest, although he at the time holds a power from the owner of the other moiety, and the mortgage purports to be of the whole estate, if it does not purport to be made by virtue of his power from the other owner, as well as in his own right.³

142. The mortgage of a building carries with it the land on which it stands and which is essential to its use, if such appears to have been the intention of the parties.⁴ Thus a mortgage made to secure advances to enable the mortgagor to erect a building on leased land of "all his right, title, and interest, which he now has in the foundation or stone work of said building, and which he may have in and unto said building, during its erection and completion, and after it is completed," passes the land on which the building stands.⁵ The right which the grantor has in the foundation, stone work, and building is not merely or mostly a right to the materials of which they are composed, but the right of having them on the premises as part of a structure, with the right to use and occupy them for a long period of time. It is a grant of his right to the use and occupation of the land under the lease.

As a general rule, a building erected upon the land of another

¹ Potts v. Blanchard, 19 La Ann. 167.

⁴ Wilson v. Hunter, 14 Wis. 683.

² Carpenter v. Millard, 38 Vt. 9.

⁵ Greenwood v. Murdock, 9 Gray

³ Shirras v. Caig, 7 Cranch, 34.

(Mass.), 20.

becomes a part of the realty, and it is only by an express agreement that one can have a separate property in such a building as a chattel, with a right to remove it. If one having a contract for the purchase of a lot of land erect a house upon it, in pursuance of an agreement that he will do so, and that on receiving a deed of the land he will mortgage it to the owner to secure the purchase money, he cannot, before receiving a deed of the land, mortgage the house as personal property to another. This agreement, instead of being an agreement that the house may be held separate from the land, is in effect an agreement that the building and land shall be united and held together.¹

143. House moved from the mortgaged land. — A mortgage was made of a lot of land upon which was a dwelling-house. Subsequently, and without the knowledge or consent of the mortgagee, the mortgagor removed the house from the lot upon which it stood, and placed it upon an adjoining lot. It was held that the mortgagee retained his lien upon the dwelling-house, and that the house might be sold after first applying the lot covered by the mortgage towards satisfying it. The adjoining lot was owned by the wife of the mortgagor, and the removal was with her knowledge.² By agreement, express or implied, between the owner of real estate and the owner of buildings, the latter may annex the buildings to the realty, without their becoming part of it. So in the case stated, the house did not necessarily become a part of the lot upon which it was placed by the removal. Under such circumstances there is no reason why the mortgagee should not have the benefit of the security for which he contracted. No question arises in this case as to the effect of substantial alterations in the building, which might sometimes affect or change the title to property altered from its original form. Such was the case where a mortgagor removed a dwelling-house from the mortgaged premises, and used the materials in the construction of a house upon another lot of land, and afterwards sold the house and lot. The materials having thus become a part of the freehold, the right of property therein vested in the grantee of the land; and therefore the mortgagee could not maintain trover against the purchaser, either for the new house or for the old materials used in its con-

¹ *Milton v. Colby*, 5 Met. (Mass.) 78.

² *Hamlin v. Parsons*, 12 Minn. 108; and see *Hutchins v. King*, 1 Wall. 53.

struction.¹ "The general rule is," says Mr. Justice Wilde, "that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser, who wilfully takes the property of another, can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. But there are exceptions to the general rule.

"It is laid down by Molloy as a settled principle of law, that if a man cuts down trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows, not the owners but the builders.² . . .

"In the present case it cannot be questioned that the newly erected dwelling-house was a part of the freehold, and was the property of the mortgagor. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action, even against the mortgagor, for the conversion of the new house. And it is equally clear that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down of that house and using the materials in the construction of the new building was the tortious act of the mortgagor, for which he alone is responsible."

144. But the lien of the mortgage is held to be removed from fixtures severed from the realty. — By severance they become personal property, and when taken away from the realty are freed from the lien of the mortgage.³ A house having been floated off the lot covered by the mortgage into an adjacent street

¹ *Peirce v. Goddard*, 22 Pick. (Mass.) Finley, 19 Barb. (N. Y.) 317. But see 559. *Hutchins v. King*, 1 Wall. 53, 59, per

² *Mol. de Jure Mar. lib. 2, c. 1, § 7.* Field, J., cited § 145.

³ *Hill v. Gwin*, 51 Cal. 47; *Gardner v.*

by a flood, was sold by the owner to a person who had notice of all the circumstances. An action was brought to foreclose the mortgage upon the land and the house then standing in the street. The court held that the house was effectually removed from the operation of the mortgage lien; and that so far as the legal effect of the removal was concerned it was immaterial whether the severance was by the act of God, as in this case, or the act of man.¹

145. A mortgage of wood not standing on the land of the mortgagor is a mortgage of personal property, and a record of it as a mortgage of real estate is ineffectual.² But growing wood or timber is a portion of the realty, and is embraced in a mortgage of the land. In a case before the Supreme Court of the United States,³ Mr. Justice Field declared that the mortgage covers the timber after it is cut as well as before; that the sale of it by the mortgagors does not divest the lien of the mortgage; that the purchaser of the timber takes it subject to this paramount lien; and that the holders of the mortgage can follow it and take possession of it, and hold it until the amount due upon the mortgage is paid.

146. A mortgage of improvements conveys no title to the land itself. It passes only a right to the improvements placed upon the land by the mortgagor, or an equitable right to compensation for them in case the owner of the land should take possession. A subsequent acquisition of the title to the land by the mortgagor does not in such case enure to the benefit of the mortgagee.⁴

A mortgage of a building erected on leased land under an agreement that the lessee might remove it, or the lessor should

¹ *Buckout v. Swift*, 27 Cal. 433. Mr. Justice Shafter, delivering the opinion of the court, said:—

“A building, severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is disincumbered of the lien, substantially on the same principle that a building, erected upon the lands after the giving of the mortgage, is subject to the lien. In the first case, the building is withdrawn

from the operation of the mortgage, for the reason that it has ceased to be a thing real; in the other, mere materials are brought under the lien, for the reason that they have become a structure by combination, and the structure has become a thing real by position.”

² *Douglas v. Shumway*, 13 Gray (Mass.), 498.

³ *Hutchins v. King*, 1 Wall. 53, 59.

⁴ *Mitchell v. Black*, 64 Me. 48.

pay for it at its appraised value, is a mortgage of realty falling within the designation of a chattel real at common law.¹

147. The lien of a mortgage extends to all improvements and repairs subsequently made upon the mortgaged premises, whether made by the mortgagor or by a purchaser from him without actual notice of the existence of the mortgage.² Thus a mortgage of a ditch or flume in process of construction includes, without any special mention, all improvements or fixtures then on the line located for the flume, as well as those which may afterwards be put thereon.³

148. An abstract of title delivered by the owner of land to the mortgagee's attorney, for the purpose of decreasing the expenses of searching the title, may be regarded as part of the security for the loan, and accordingly it has been held that the mortgagor is not entitled to the possession of it until the mortgage is paid. In case of a sale of the mortgage, or of a foreclosure, it would be necessary that the mortgagee should have it, or that another should be made.⁴

2. Accessions to the Mortgaged Property.

149. At common law, nothing can be mortgaged that does not belong to the mortgagor at the time the mortgage is made.⁵ "It is a common learning in the law, that a man cannot grant or charge that which he hath not."⁶ He must have a present property, either actual or potential, in the thing sold or mortgaged.⁷ Therefore at law, although a mortgage in terms is made to cover after acquired property, yet after such property is acquired, an execution levied upon it as the property of the mortgagor, or a sale by him, will prevail over the mortgage.⁸

¹ Griffin v. Marine Co. of Chicago, 52 Ill. 130.

² Martin v. Beatty, 54 Ill. 100; Rice v. Dewey, 54 Barb. (N. Y.) 455.

³ Union, &c. Co. v. Murphy's Co. 22 Cal. 620.

⁴ Holm v. Wust, 11 Abb. (N. Y.) Pr. N. S. 113.

⁵ Moody v. Wright, 13 Met. (Mass.) 17; Jones v. Richardson, 10 Ib. 481; Pierce v. Emery, 32 N. H. 484; Amonett

v. Amis, 16 La. Ann. 225; Ross v. Wilson, 7 Bush (Ky.), 29; and see Coe v. Columbus, &c. R. Co. 10 Ohio St. 391; Lunn v. Thornton, 1 Com. B. 379.

⁶ Perkins, tit. Grant, § 65.

⁷ Looker v. Peckwell, 38 N. J. L. 253; Smithhurst v. Edmunds, 14 N. J. Eq. 408; Benjamin on Sales, §§ 78-84.

⁸ Looker v. Peckwell, *supra*, and cases cited.

But a different rule prevails in equity.¹ Judge Story,² after an elaborate examination of the question, in stating the result of it says: "It seems to me the clear result of all the authorities, that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

150. Products of the soil. — Upon this principle a valid mortgage may be made by an owner, or lessee in possession of land, of a crop to be raised by him the coming season, or of crops to be grown within a certain period.³ It is a general rule that a thing which has a potential existence may be mortgaged. "Land is the mother and root of all fruits," says Lord Hobart.⁴ "Therefore he that hath it may grant all fruits that may arise from it after, and the property shall pass as soon as the fruits are extant."

A landlord has no such interest in, or title to, crops grown on the rented lands as can be made the subject of a valid mortgage.⁵

A mortgage of grain "now standing and growing" in a field does not cover, as against an attaching creditor, grain which had at the time of the execution of the mortgage been cut.⁶

Under a mortgage of a greenhouse and nursery, together with the shrubs and plants belonging to the same, new plants and

¹ In *Langton v. Horton*, 1 Hare, 549.

(N. Y.) 37; *Barnard v. Eaton*, 2 Cush. (Mass.) 295, per Shaw, C. J.; *Comstock v. Scales*, 7 Wis. 159; *Hutchinson v. Ford*, 9 Bush (Ky.), 318.

In a recent case in Kentucky, however, it is said that if such a mortgage is enforceable in equity at all, it can only be enforced as a right under the contract, and not as a trust attached to the property. *Ross v. Wilson*, *supra*.

² *Mitchell v. Winslow*, 2 Story, 630; and see *Smithhurst v. Edmunds*, *supra*.

³ *Arques v. Wasson*, 51 Cal. 620; *Lehman v. Marshall*, 47 Ala. 362; *Jones v. Webster*, 48 Ala. 109; and see *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 12; *Stover v. Eycleshimer*, 3 Keyes (N. Y.), 620. See, *contra*, at law, *Milliman v. Neher*, 20 Barb.

⁴ *Grantham v. Hawley*, Hobart, 132. He further remarks that "a person may grant all the tithe wool that he shall have in such a year; yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially."

⁵ *Broughton v. Powell*, 52 Ala. 123.

⁶ *Ford v. Sutherland*, 2 Mont. 440.

shrubs, the growth of cuttings from those growing at the time of the mortgage, pass to the mortgagee by accession.¹

151. Crops not sown. — A valid mortgage may be made of a crop before it is raised,² and although the seed of it has not been sown.³ A mortgage of crops by one who is cultivating a farm upon shares covers only his share.⁴ Possession by a prior mortgagee of a crop is notice of his rights to subsequent purchasers or incumbrancers.⁵ The mortgage in equity attaches as soon as the crop comes into existence.⁶

The crop is a chattel interest, and the mortgage of it should be recorded as a chattel mortgage. When so recorded one who purchases and removes the crop, without the knowledge of the mortgagee, takes it subject to the rights of the mortgagee, who may recover the property if it can be identified, and if not, he may recover the value of it from such purchaser.⁷ The mortgagee is entitled to the possession of the crop, when it is matured and gathered, and may then maintain an action to recover it or its value.⁸ Such a mortgage passes a mere equitable interest while the crop is growing, but after severance the equitable interest ripens into a

¹ *Bryant v. Pennell*, 61 Me. 108. The plaintiff attached so much of the stock of plants and shrubs as were not covered by the mortgage. His counsel claimed that the maxim, "*Partus sequitur ventrem*," did not apply; that it might as well be contended that trees raised from the seed of apples picked from a mortgaged tree passed under the mortgage, as to say the cuttings did.

² *Ellett v. Butt*, 1 Woods, 214; *Robinson v. Mauldin*, 11 Ala. 977.

³ *Butt v. Ellett*, 19 Wall. 544; *Apperson v. Moore*, 30 Ark. 56; *Comstock v. Scales*, 7 Wis. 159.

The statute of Mississippi, providing that mortgages may be made of cotton crops to be produced within fifteen months, is merely declaratory of the law, with a limitation as to the time within which the crop must be produced. Act Feb. 18, 1867; *Sillers v. Lester*, 48 Miss. 513; *Ellett v. Butt*, 1 Woods, 214.

In this State mortgages and deeds of trust may be made to cover growing crops,

or crops to be grown within fifteen months from the making of such mortgage or deed, which are valid upon the interest of the mortgagor or grantor in such crop, but are subject to any lien in favor of the landlord for the rent of the property. Such mortgages must be recorded in a separate book, entitled a chattel deed book. Laws 1876, pp. 100, 113.

In Arkansas, mortgages may be made of crops already planted, or to be planted, and are binding upon such crops and their products. And a laborer may mortgage his interest in a crop for supplies furnished him. Acts 1875, p. 230.

⁴ *McGee v. Fitzer*, 37 Tex. 27.

⁵ *Grimes v. Rose*, 24 Mich. 416.

⁶ *Butt v. Ellett*, 19 Wall. 544; *Apperson v. Moore*, 30 Ark. 56; *Lehman v. Marshall*, 47 Ala. 363.

⁷ *Duke v. Strickland*, 43 Ind. 494.

⁸ *Lehman v. Marshall*, 47 Ala. 363; *Adams v. Horton*, 5 Ib. 740; *Robinson v. Mauldin*, 11 Ala. 977.

legal title.¹ If the crop be severed and sold without the consent of the mortgagee, he may recover the value of it from a purchaser, although he has purchased it in the usual course of trade, and without actual notice. The record is constructive notice. The removal of the crop is not such a change in the property as will divest the title of the mortgagee.²

152. A mortgage by a railroad company specifically covering after acquired property is binding in equity upon real estate and personal property afterwards purchased for the use of the road, as against the mortgagors and all persons claiming under them, except purchasers for value and without notice; and especially will it bind such property, as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage.³ "Whenever a mortgage is made by a railroad company to secure bonds, and the mortgage declares that it shall include all present and after acquired property, as soon as the property is acquired the mortgage operates upon it. In other words, it seizes the property or operates on it by way of estoppel, as soon as it comes into existence and is in possession of the mortgagor; and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in possession of the mortgagor."⁴

Such is the settled law of the federal courts;⁵ and generally of the state courts as well.⁶ The rule is applied equally to real estate and personal property; to mortgages by individuals as well as those made by corporations.⁷

¹ *Mauldin v. Armistead*, 14 Ala. 702; 18 Ala. 500.

² *Duke v. Strickland*, 43 Ind. 494.

³ *Stevens v. Watson*, 4 Abb. (N. Y.) App. Dec. 302.

⁴ Per *Drummond, J.*, in *Scott v. Clinton & Springfield R. R. Co.* 8 Chicago Legal News, 210.

⁵ *Pennock v. Coe*, 23 How. 117; *Galveston R. Co. v. Cowdrey*, 11 Wall. 481; *Dunham v. Railway Co.* 1 Wall. 254; *Mitchell v. Winlow*, 2 Story, 630.

⁶ *Pierce v. Mil. R. Co.* 24 Wis. 551; *Hoyle v. Plattsburgh R. Co.* 51 Barb. (N.

Y.) 45; *Seymour v. Canandaigua, &c. R. Co.* 25 Ib. 284; *Benjamin v. Elmira, &c. R. Co.* 49 Ib. 441; *S. C.* 54 N. Y. 675; *Sillers v. Lester*, 48 Miss. 513; *Howe v. Freeman*, 14 Gray (Mass.), 566; *Coopers v. Wolf*, 15 Ohio St. 523; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Morrill v. Noyes*, 56 Me. 458; *Phila. &c. Co. v. Woelpper*, 64 Pa. St. 366.

⁷ *Holroyd v. Marshall*, 10 H. L. Cas. 191, overruling *dictum* of Baron Parke in *Mogg v. Baker*, 3 M. & W. 195. The latter case was followed by the Supreme Court of Massachusetts in *Moody v.*

153. Rule as to after acquired property. — “It seems to me,” says Judge Story,¹ “a clear result of all the authorities, that wherever the parties by their contract intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy.”

The chief question, therefore, is, whether the parties to the mortgage intended that the after acquired property, which is in any case the subject of litigation, should be subject to the lien of the mortgage; and it will be noticed that in the recent cases the contention is generally upon this question.

154. Applied to railroad companies. — A mortgage which by

Wright, 13 Met. 17, holding that property not in existence at the time of making the mortgage is incapable of being conveyed by it.

In the District Court for Massachusetts the doctrine of the state courts was dissented from in the recent case of *Brett v. Carter*, 2 Lowell, 458, where it was held that a mortgage of after acquired chattels is valid against the assignee in bankruptcy of the mortgagor. See same case in 3 Central Law Journal, 286, and an article upon it in same volume, p. 359. See, also, in same volume, p. 608, decision of Judge Clifford, in the case of *Barnard v. Norwich & Worcester R. Co.*, before the Circuit Court of the United States, reported also in 14 N. B. R. 469.

In *Brett v. Carter*, *supra*, Judge Lowell says: “I suppose that the federal courts, in all matters of the title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the state in which they sit; or, in other words, I understand that the thirty-fourth

section of the judiciary act, making the law of the state the rule in actions at common law, is declaratory only, and that on both sides of this court I am bound to follow the law of Massachusetts in local questions, and the general law in general questions.” . . .

“Considering the decision by Judge Story in this circuit, and the reasons given by the court of Massachusetts for not following it, and the entire consistency of all recent decisions with Judge Story’s views, and the disappearance of Baron Parke’s *dictum*, I am not prepared to say, that, if the Supreme Judicial Court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it; and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is, that a mortgage of after acquired chattels is valid.”

¹ *Mitchell v. Winslow*, 2 Story, 630, 644, where the cases are reviewed. And see, also, *Christy v. Dana*, 34 Cal. 548; *Amonett v. Amis*, 16 La. Ann. 225.

its terms covers property which a railroad company may afterwards acquire, though given before any part of the road is built, covers after acquired property contemplated by the mortgage.¹ It attaches to the property as it comes into existence. As against the railroad company and its privies, the after acquired property feeds the estoppel created by the deed. Even against a contractor who has at his own expense finished a railroad under contract that he shall keep possession until he has been paid, a mortgage in such terms will pass the road afterwards built and acquired.²

A mortgage of its line of road, its tolls and revenues, covers all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues.³ A mortgage of tolls and revenues conveys only the net income of the road, after payment of all expenses.⁴

A mortgage by a railroad company of "all the present and future to be acquired property of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road.⁵ A mortgage on a road with its engines, depots, and shops then owned by the company, or which they might thereafter acquire, "with the superstructure, rails, and other materials used thereon," is construed to embrace wood provided for the use of the road from time to time.⁶

155. Suggestion that after acquired property of a railway corporation is an incident to the franchise. — It has been suggested that when a mortgage is made to cover the franchise of a corporation, property after acquired by it will pass by it as an incident to the franchise, and as an accession to the subject of the mortgage.⁷

The suggestion that a mortgage by a railroad company made in

¹ *Morris Canal Company case*, 3 Green's Ch. 402; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 481.

² *Dunham v. Railway Co.* 1 Wall. 254.

³ *State v. Northern, &c. R. Co.* 18 Md. 193.

⁴ *Parkhurst v. Northern, &c. R. Co.* 19 Md. 472.

⁵ *Pullan v. Cincinnati, &c. R. Co.* 4

Biss. 35; and see, also, *Hoyle v. Plattsburgh R. Co.* 51 Barb. (N. Y.) 45.

⁶ *Coe v. McBrown*, 22 Ind. 252. See *Bath v. Miller*, 53 Me. 308.

⁷ *Stevens v. Buffalo, Corning & N. Y. R. Co.* 45 How. (N. Y.) Pr. 104. The decision was not, however, based upon this proposition. See *Rowan v. Sharp's Rifle Co.* 29 Conn. 282; *Chew v. Barnet*, 11 S. & R. (Pa.) 389.

pursuance of its charter, or of a law authorizing it, attaches to subsequently acquired property, for the reason that the franchise by virtue of which the property was acquired itself passed by the mortgage, was noticed by the Supreme Court of Wisconsin. The court however, while questioning the reason so assigned, held that when a mortgage by express terms covers lands that may be subsequently acquired for the uses of the company, the lien will attach to such lands the moment the company acquires an interest in them, although this interest be only a contract of purchase. The mortgagee may compel a conveyance under such a contract, and the company cannot impair the lien by a sale without the mortgagee's consent.¹

But in a case before the Court of Appeals of Kentucky the power of a corporation to pass by its mortgage after acquired property was placed altogether upon this ground, the court saying that the power to pledge the franchises and rights of the corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which its real value depends. When a railroad mortgage is made which is to continue for many years, new cars and engines and materials of different kinds will become necessary from time to time, and the road would be of little value without them; therefore if included in a mortgage they are effectually covered by it.²

156. A mortgage by a railway company does not by implication cover property not essential to its business.— But a mortgage by a railroad company or other corporation will not cover property belonging to it, which is not essential to its business and is not specifically described by any of the terms used in the mortgage. Thus a mortgage by a railroad company of its real estate, road, bridges, ferries, locomotives, engines, cars, and all other personal property belonging to it, does not include canal boats run in connection with the road beyond its terminus.³ Town lots, held by a railroad company, do not pass by a sheriff's sale, under a mortgage of the road, "with its corporate privileges and appurtenances," when they are not directly appurtenant to the railroad and indispensably necessary to the enjoyment of its fran-

¹ Farmers' Loan & Trust Co. v. Fisher, 17 Wis. 114; Hill v. La Crosse & Milw. R. Co. 11 Wis. 214.

² Phillips v. Winslow, 18 B. Mon. (Ky.) 445.

³ Parish v. Wheeler, 22 N. Y. 494.

chises.¹ A mortgage of the stock, materials, and every other kind of personal property which shall be used for operating a railroad, does not profess to cover railroad chairs afterwards bought by the company, but which were never used by it.² A mortgage which does not purport to cover materials subsequently acquired is not made valid as to such materials from any consideration of the nature and object of the mortgage, as for instance that it was made for the purpose of raising money to complete the road.³

A mortgage by a railroad company upon its road and real estate then owned by it, or which it might afterwards acquire, may be considered an equitable mortgage as to the property subsequently acquired for the purposes of its road, and is a valid lien upon after acquired land so taken and used.⁴ Any property connected with the use of its franchise, whether real or personal, to be subsequently acquired may be effectually mortgaged.⁵ Upon foreclosure of such a mortgage, the property and rights of the corporation as they exist at the time of the foreclosure pass to the mortgagees or to the purchasers.⁶

157. On the principle of accession it has been held that without particular mention of the property afterwards acquired, a mortgage by a railroad company of all its property and rights of property will pass property afterwards acquired and essential to its use, even as against other creditors who claim by later mortgages. Such a mortgage is regarded as in substance a conveyance of the road and franchise as an entire thing, and the subsequently acquired property as becoming a part of it by accession, and as incident to the franchise; and therefore a cargo of railroad iron, after it is delivered to the railroad company, becomes subject to the lien of such a mortgage.⁷ And so a mortgage intended to cover the whole property of the road is held to pass the rolling stock, though not expressly named.⁸

¹ Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465. See Dinsmore v. Racine, &c. R. Co. 12 Wis. 649, as to mortgage covering a lot of woodland lying seven miles from the road track.

² Farmers' Loan, &c. Co. v. Commercial Bank, 11 Wis. 207.

³ Farmers' Loan, &c. Co. v. Commercial Bank, 15 Wis. 424.

⁴ Benjamin v. Elmira, Jefferson & Can-

andaigua R. R. Co. 49 Barb. 441; S. C. 54 N. Y. 675; Seymour v. Canandaigua & Niagara Falls R. R. Co. 25 Barb. 284.

⁵ Coe v. Peacock, 14 Ohio St. 187.

⁶ Miller v. Rutland, &c. R. Co. 36 Vt. 452.

⁷ Pierce v. Emery, 32 N. H. 484.

⁸ Hoyle v. Plattsburgh, &c. 51 Barb. (N. Y.) 45.

It has been held, however, that the lien of the mortgage cannot be extended, on this principle of accession, to cover personal property never actually annexed to the realty or used upon it: as for instance to railroad chairs purchased for the road, but not actually used in the construction or repair of it.¹

158. The mortgage is subject to any liens there may be upon the property when acquired.—A mortgage intended to cover after acquired property attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. "It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives, and the mortgage which he gives, are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."²

A mortgage by a railroad company covering all future acquired property attaches only to such interest therein as the company acquires, subject to any lien under which it comes into the company's possession.³

159. Whether a covenant of a third person will pass by mortgage.—Whether a covenant of the purchaser of a portion of a railroad to pay a portion of the mortgage debt, and in case of default allowing the company to reënter upon the premises and sell them under foreclosure, would pass by a subsequent mortgage given by the company, conveying the road with its franchises and all "causes of action, demands, and choses of action, of whatever nature," is questionable. The fact that the subsequent mort-

¹ Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207; S. C. 15 Wis. 424; Hill v. La Crosse & Milw. R. R. Co. 11 Wis. 214.

² United States v. New Orleans Railroad, 12 Wall. 362-365, per Bradley, J.

³ United States v. N. O. Railroad, *supra*.

gage was expressly made subject to the prior mortgage for the payment of a portion of which such covenants were given would probably prevent their passing.”¹

A right of way for a railroad may be pledged as security for a loan, and upon default may be sold and transferred so as to vest the easement in the purchaser.²

160. A mortgage may be made of the future net earnings of a railroad company to secure the payment of interest upon its construction bonds.³ But a mortgage which does not by its terms grant the income or earnings of the road gives the mortgagee no right to them.⁴

161. The mortgage does not cover the corporate existence. A mortgage by a railroad company of its road and franchise, as a security for debt, is held not to convey its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance beneficial to the grantees, and to enable them to maintain and manage the road, and receive the profits to their own use.⁵

¹ Milwaukee & Minn. R. R. Co. v. Milwaukee & West. R. R. Co. 20 Wis. 174.

³ Jessup v. Bridge, 11 Iowa, 572.

² Junction R. Co. v. Ruggles, 7 Ohio St. 1.

⁴ Farmers' Loan & Trust Co. v. Cary, 13 Wis. 110.

⁵ Eldridge v. Smith, 34 Vt. 484.

CHAPTER V.

EQUITABLE MORTGAGES.

162. Introductory.—It has been noticed that a conveyance, accompanied by a condition contained either in the deed itself or in a separate instrument executed at the same time, constitutes a legal mortgage, or a mortgage at common law. In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts which are wanting in one or both of these characteristics of a common law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages.

There are many kinds of equitable mortgages—as many as there are varieties of ways in which parties may contract for security by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage. It is not even necessary that the contract should be in express terms a security; for equity will often imply this from the nature of the transactions between the parties. For instance, a contract for security is, in England and in some States of America, implied from a deposit of title deeds.

It has been noticed in the preceding chapter, that rights and interests in realty which are only equitable are often the subject of mortgage; that in equity formal mortgages are often made to embrace property, which at common law would not be covered at all; as for instance property acquired after the execution of the mortgage. But the term equitable mortgage is used more properly with reference solely to the kind of instrument or contract by which equity establishes a lien. It is the equitable form

of the transaction, rather than the equitable nature of the property, to which this chapter has reference.

There are some kinds of equitable mortgage so common and so important that they will be treated of at length farther on; as for instance absolute conveyances without any defeasance except by parol, and liens of vendors under written contracts or reservations. In this chapter, therefore, the less important transactions which in equity are recognized as creating securities will be treated of.

1. *By Agreements and Informal Mortgages.*

163. An agreement to give a mortgage, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will treat that as done which by agreement is to be done. This doctrine has been asserted frequently, both in this country and in England.¹ It is of frequent application under the bankrupt laws, where it operates to make valid a mortgage given to a creditor, shortly before the filing of a petition in bankruptcy by the mortgagor, when this is done in pursuance of an agreement made at a time when the giving of the mortgage would not have been a fraudulent preference.²

An agreement to make a conveyance of land, when intended as security for a debt, is in the same manner a mortgage. But all such agreements to give mortgages or other conveyances by way of security are ineffectual when no particular property is specified on which the security is to be given. An agreement to give a mortgage on sufficient property is not effectual.³ Such agreement can of course bind only the maker of it and his heirs, and persons having notice. It is not of any force as against his subsequent judgment creditors.⁴

The meaning of the maxim, that equity looks upon things agreed to be done as actually performed, is that equity will treat the matter, as to collateral consequences and incidents, in the

¹ Russel v. Russel, 1 Bro. C. C. 269; 647; Adams v. Johnson, 41 Miss. 258. Cotterell v. Long, 20 Ohio, 464; Chase v. Peck, 21 N. Y. 581; In re Howe, 1

Paige (N. Y.), 125; Morrow v. Turney, 35 Ala. 131; Bank v. Carpenter, 7 Ohio, 21; Daggett v. Rankin, 31 Cal. 321; Delaire v. Keenan, 3 Desau. (S. C.) 74; Petrie v. Wright, 6 Sm. & M. (Miss.)

² Burdick v. Jackson, 7 Hun (N. Y.), 488.

³ Adams v. Johnson, 41 Miss. 258.

⁴ Price v. Cutts, 29 Ga. 142; Racouillat v. Sansevain, 32 Cal. 376.

same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.¹

164. It is not even necessary that the agreement should in all cases be in writing. — Although a parol agreement in respect to lands while it remains altogether executory is not enforceable, yet when there has been a part performance of it, it cannot in equity be avoided. When such parol agreement has been performed by a delivery of a formal mortgage, all objection to the validity of the agreement is removed, and it becomes as effectual for all purposes as if it had been reduced to writing originally. In this way a mortgage made a few days before the bankruptcy of the mortgagor, but in pursuance of a parol agreement made fifteen months before, and based upon a good consideration, is good against the assignee in bankruptcy, and not open to the objection that it is void as a fraudulent preference.²

165. Upon this principle, the entry of an agreement by a corporation upon its records, that a certain bond for title should be pledged to certain of its members as security for liabilities, which they were about to incur for the company, was held to be an equitable mortgage; and although a deed of trust was afterwards made in conformity with the resolution, yet these members having acted upon the faith of it before the deed of trust was made were held to be entitled to the security as from that time, and the deed of trust was regarded only as a confirmation of the agreement, and as having relation to the resolution.³

The maker of two notes gave an instrument to his sureties on the notes reciting that they were given for the purchase of land, and providing, "In case I fail to pay said notes, I do bind myself, my heirs, &c., to convey to said sureties the aforesaid land." It was held that upon the failure of the principal to pay the notes the sureties were entitled not to an absolute conveyance but to a mortgage.⁴

166. An instrument which does not transfer the legal es-

Daggett v. Rankin, 31 Cal. 321, 326,
per Currey, C. J.

³ Miller v. Moore, 3 Jones (N. C.) Eq.
431.

² Bardick v. Jackson, 7 Hun (N. Y.),
488.

⁴ Courtney v. Scott, 6 Litt. (Ky.) 457.

tate may yet operate as an equitable transfer of it in the nature of a mortgage. Such was held to be the effect of an agreement under seal made by one to whom land was conveyed in consideration that he should support and maintain the grantor, whereby the produce of the land was pledged for that purpose, and if that should prove insufficient, the entire fee was appropriated.¹ Such too is a similar instrument, in which the signer agrees to maintain his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them "each and severally a life lien or dower or lien of maintenance for life" in real estate.² The words, "we mortgage the property," accompanied by a provision for the sale of it upon non-payment of money thus secured, have been held sufficient to create a mortgage.³

An instrument whereby a corporation "pledges the real and personal estate of said company," for the fulfilment of a contract, may be enforced as a mortgage against the company, and all persons claiming under it with notice; and is not rendered invalid for the reason that the property of the company is pledged without specification, or that the amount secured is not stated, or the time of redemption fixed.⁴

An instrument which recites that the maker of it had employed certain persons as counsel to prosecute a claim to certain land, and promises the payment of a certain sum "at the end of the litigation out of the land," is a mortgage.⁵ It indicates the creation of a lien, and specifies the debt intended to be secured and the property upon which it is to take effect. And so an agreement in a lease, that the lessor "is to have a lien" upon certain property for the faithful performance of the lessee's obligation to pay rent, is in effect a mortgage.⁶

A covenant by a debtor, to execute to his creditor a mortgage upon the debtor's share under his father's will, whenever a division should have been made, was held to be a mortgage.⁷ So was a provision in a deed that the grantee shall pay certain legacies which are a charge upon the property conveyed.⁸ So also an

¹ See *Chase v. Peck*, 21 N. Y. 581.

⁵ *Jackson v. Carswell*, 34 Ga. 279.

² *Gilson v. Gilson*, 2 Allen (Mass.), 115.

⁶ *Whiting v. Eichelberger*, 16 Iowa, 422.

⁷ *Lynch v. Utica Ins. Co.* 18 Wend. (N. Y.) 236.

³ *De Leon v. Higuera*, 15 Cal. 483; and see *Barroilhet v. Battelle*, 7 Cal. 450.

⁸ *Stewart v. Hutchins*, 6 Hill (N. Y.),

⁴ *Mobile & C. P. R. Co. v. Tahman*, 15 Ala. 472.

agreement not under seal which provided that the purchase money of land if not sold by the purchaser should be secured by the property, and if sold, then paid from the proceeds.¹

167. A written agreement that attempts to appropriate specific property to the payment of a debt, and gives the creditor possession of it to hold till the debtor shall make sale of the land and satisfy the debt from such sale, the occupation of the land and the doing of certain work to offset interest on the debt, constitutes an equitable mortgage binding upon the owner of the land, and upon any one who buys of him with notice of the agreement.²

An agreement on the back of a note, making it a charge upon particular land, is an equitable mortgage. In this way an agreement intended to operate as a revival of a mortgage note which had been paid may be rendered effectual, although ineffectual to revive the mortgage lien.³

An agreement by the equitable owner of land, that the holder of the legal title may hold it as security for the payment of a sum of money borrowed by the former or a third person, creates an equitable lien upon the land in favor of the lender.⁴

168. **Informal mortgages.** — A mortgage, or trust deed, which cannot be enforced by a sale under the power or by a judgment of foreclosure, on account of some informality requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by special proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage. Any agreement between the parties in interest that shows an intention to create a lien may be in equity a mortgage.⁵ As stated by Judge Story,⁶ "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage."

Effect has been given in this way to a deed of trust in which

¹ *Racouillat v. Sansevain*, 32 Cal. 376.

² *Blackburn v. Tweedie*, 60 Mo. 505.

³ *Peckham v. Haddock*, 36 Ill. 39.

⁴ *Chadwick v. Clapp*, 69 Ill. 119.

⁵ *Daggett v. Rankin*, 31 Cal. 321.

⁶ *Flagg v. Mann*, 2 Sum. 533.

the name of the trustee was accidentally omitted ;¹ to one from which a seal was omitted by mistake ;² to one sealed in fact, but not expressed to be sealed ; to one imperfectly acknowledged, or not acknowledged at all ;⁴ or not witnessed as a deed of real estate is required to be.⁵

169. Mortgage defectively executed in name of agent.— Upon this principle a mortgage purporting to be the mortgage of a corporation, but not executed in its name, so as to be legally binding upon it, is held to be binding in equity if it appear that the officer or agent had authority to bind it, and by accident or mistake executed it in his own name instead of the name of the company. In such a case, before the Supreme Court of California,⁶ it was urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore the defective execution could not be aided. In answer to this Mr. Justice Shafter, delivering the opinion of the court, replies, that where there is a defective execution of a power, it is a matter of no equitable moment whether the error came of a mistake of law or mistake of fact. It is enough that the power existed, and that there was an attempt to act under it. The relief is not so much by way of reforming the instrument as by aiding its defective execution ; which aid is administered through or by the application of well settled maxims of the law ; or, as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered as properly executed as a contract for a deed ; and therefore as requiring neither reformation nor aid, but as ripe for enforcement, according to the methods peculiar to courts of equity.

170. Mortgage by implied trust.— It would seem that if a mortgage be made to two persons conditioned to secure the payment of a debt to one of them only, the legal estate would vest in them as tenants in common ; but the one having no claim secured

¹ *McQuie v. Peay*, 58 Mo. 56 ; *Burnside v. Wayman*, 49 Mo. 356.

³ *Jones v. Brewington*, 58 Mo. 210.

⁴ *Black v. Gregg*, 58 Mo. 565.

² *McClurg v. Phillips*, 49 Mo. 315 ; 57 Mo. 214 ; *Dunn v. Raley*, 58 Mo. 134 ; *Harrington v. Fortner*, 58 Mo. 468 ; *Gill v. Clark*, 54 Mo. 415.

⁵ *Abbott v. Godfrey*, 1 Mann. (Mich.) 198 ; *Lake v. Doud*, 10 Ohio, 415.

⁶ *Love v. Sierra Nevada, &c. Mining Co.* 32 Cal. 639.

would be trustee to the extent of his moiety, and hold it in trust to secure the debt due the other.¹

In like manner where one advances money to pay off a mortgage, which is thereupon assigned for his protection to one of the owners of a part of the property, it is a trust in the hands of the latter, and may be established, as against all parties having notice of these facts, as an equitable lien, although the mortgage has been discharged of record.²

171. An assignment of rents and profits of land as security is an equitable mortgage. Such an assignment, in the words of Lord Thurlow, "is an odd way of conveying; but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."³

A formal mortgage of a leasehold estate amounts only to an assignment of the rents and profits for the whole term, in states where foreclosure cannot be effected by a sale, but only by a strict foreclosure or a proceeding in that nature.⁴

A stipulation in a lease, that the building erected by the lessee "is mortgaged as security" for rent, is a good mortgage.⁵ An assignment of a lease absolutely, accompanied with a bond stating it to have been made to secure the payment of a debt, and providing for a reconveyance upon payment, is a mortgage,⁶ in the same way that an absolute conveyance in fee accompanied by such a bond is a mortgage.

2. *By Assignments of Contracts of Purchase.*

172. An assignment by the vendee of a contract of sale of land as security for a loan may be regarded as an equitable mortgage.⁷ The rules applicable to a mortgage of real property govern it both as to the effect of it and the mode of enforcing it.⁸

Where one having a contract for the purchase of land agrees with another that he shall pay the purchase money and take a deed of the land for his security until repaid, the arrangement

¹ Root v. Baneroft, 10 Met. (Mass.) 44.

⁶ Jackson v. Green, 4 Johns. (N. Y.)

² King v. MeVickar, 3 Sandf. (N. Y.) 186.

Ch. 192.

⁷ Fitzhugh v. Smith, 62 Ill. 486.

³ Willis, ex parte, 1 Ves. Jun. 162.

⁴ Hulett v. Soullard, 26 Vt. 295.

⁸ Brockway v. Wells, 1 Paige (N. Y.), 617.

⁵ Barroillet v. Battelle, 7 Cal. 450.

amounts to a mortgage of such equitable title.¹ In like manner if the owner of land warrants secure a debt by having them entered in the name of his creditor, such entry is a mortgage.²

A mortgage made by one who holds only a bond or contract of purchase passes only the title he has in the premises at the time, subject to be enlarged by the mortgagor's acquiring afterwards the legal title. Such a mortgage amounts to a qualified assignment of the bond or contract. If the contract and mortgage be executed formally so that they may be recorded, the record is notice to any subsequent purchaser from the vendor of the mortgagee's right to purchase the property under the contract, if the vendee does not perform the condition of the mortgage.³ The vendor and vendee cannot rescind the contract as against such mortgagee after the vendor has actual notice of the mortgage.

173. A bond for a conveyance may be assigned by way of mortgage. — If the assignee subsequently obtains the legal title to the land by virtue of the bond, and surrenders that, he will hold the land subject to the right of his assignor to redeem.⁴ Such a bond is itself sometimes declared to be in equity equivalent to a conveyance of the property, with a mortgage back; so that the assignment of it is equivalent to the assignment of a mortgage.⁵

When land is sold on credit, and a bond is given to the purchaser to make title on payment of the purchase money, the effect of the contract is to create a mortgage, the same as if the vendor had conveyed the land by an absolute deed to the purchaser, and taken back a mortgage to secure the payment of the purchase money. The lien so created is an incumbrance on the land, not only against the purchaser and his heirs, but also against all subsequent purchasers.⁶ It is said, that bonds for title came into common use through the inability of the vendor, under the public

¹ Fessler's Appeal, 75 Pa. St. 483; *Christy v. Dana*, 34 Cal. 548; *Neligh v. Purdy v. Bullard*, 41 Cal. 444.

² *Dwen v. Blake*, 44 Ill. 135.

³ *Alden v. Garver*, 32 Ill. 32.

⁴ *Baker v. Bishop Hill Colony*, 45 Ill.

264; *Jones v. Lapham*, 15 Kans. 540; *Bull*

v. Sykes, 7 Wis. 449; *Newhouse v. Hill*,

7 Blackf. (Ind.) 584; *Fenno v. Sayre*, 3

Ala. 458; *Alderson v. Ames*, 6 Md. 52;

Sinclair v. Armitage, 1 Beas. (N. J.) 174;

Michenor, 3 Stockt. (N. J.) 539.

⁵ *Jones v. Lapham*, *supra*, per Brewer, J.; *Buton v. Schroyer*, 5 Wis. 598.

⁶ *Leivis v. Boskins*, 27 Ark. 61; *Smith v. Robinson*, 13 Ark. 533; *Moore v. Anders*, 14 Ark. 628; *Shall v. Biscoe*, 18 Ark. 142; *Graham v. McCampbell*, Meigs, 52; *Tanner v. Hicks*, 4 S. & M. (Miss.) 294; *Pintard v. Goodloe*, Hemp. 502; *Thredgill v. Pintard*, 12 How. 24.

land system of the United States, to make title at the time of the sale.

174. Although the contract of sale be conditional, it providing that the purchaser shall do certain things before he shall be entitled to the conveyance of the land, the purchaser has an interest before the performance of the things to be done on his part, which he may assign by way of security. By complying with all the conditions of the contract he acquires an equitable title, and when he has that, he may compel a conveyance of the legal title. He may also sell his interest, and by agreement reserve a lien upon the contract to secure his vendee's note for the purchase price, and upon the failure of his vendee, to pay as agreed, he may in an action upon the note, and to foreclose his lien upon the contract, have judgment upon the note, and a decree of sale of the interest under the contract to satisfy it. There is a sufficient interest in the land to support the action, although it does not amount to a title or estate.¹

175. The assignment of a partial interest in a contract of purchase, as security for the payment of a debt, is an equitable mortgage; and the mortgagee may enforce his rights in equity against the assignor and those claiming under him with notice of his rights. The holder of the legal title may be enjoined from making a transfer to any one else of the property covered by the assignment.²

176. The assignment of a certificate of purchase of public lands issued by a state operates as an equitable mortgage, when intended to secure a debt due from the assignor to the assignee.³ It may be enforced for the debt, and for money paid by the assignee, in order to prevent a forfeiture of the title.⁴ A clause in a mortgage of a land certificate, empowering the mortgagee to locate, enter upon, enjoy, and dispose of said land, as if acquired by a good and lawful title, only amplifies the security without ren-

¹ *Curtis v. Buckley*, 14 Kans. 449.

v. Bounds, 1 Ohio St. 107; *Hays v. Hall*,

² *Northup v. Cross*, Seld. Notes (N. Y.), 115.

⁴ *Port. (Ala.)* 374; *Dodge v. Silverthorn*, 12 Wis. 644.

³ *Hill v. Eldred*, 49 Cal. 398; and see *Wright v. Shumway*, 1 Biss. 23; *Storer*

⁴ *Hill v. Eldred*, *supra*.

dering the conveyance absolute.¹ The mortgage is of course subject to the payment of the amount due upon the certificate.² If the purchaser pay this, the amount so paid becomes a prior lien upon the proceeds of a foreclosure sale of the land.³

A mortgage made by assigning a contract of purchase, or a land certificate, may be foreclosed by a bill in equity, in which a decree will be made for the sale of the right under the contract.⁴

An assignment of land certificates, such, for instance, as the school land certificates in some states, which are by their terms transferable by assignment and delivery, amounts to an equitable mortgage.⁵ In like manner certificates of stock in an unincorporated joint stock company, representing an interest in real estate, may be mortgaged in equity. The mortgage in such case is of course subject to the debts of the company, and to existing equities in favor of other stockholders.⁶

A settler upon public lands under the homestead act, after making proof of compliance with all the requirements of the law, so as to be entitled to a patent, may make a valid mortgage, although the patent has not been issued.⁷ But if he sell the land to another who obtains the title from the United States, the mortgagee will lose his title.⁸

177. A preëmptor of public land cannot mortgage his interest before entry. — But a valid mortgage cannot be made by a preëmption of public land before the entry of it according to law. The statutes of the United States provide that any grant or conveyance made before entry shall be void. Even where a mortgage is regarded as neither a grant nor a conveyance, and therefore not within the letter of the statute, it is construed to include a mortgage within its prohibition. The intention of the act was, that the title should be perfect and unincumbered, when it passes from the United States by the entry to the settler.⁹

¹ *Ross v. Mitchell*, 28 Tex. 150.

² *Dodge v. Silverthorn*, *supra*.

³ *Dodge v. Silverthorn*, *supra*.

⁴ *Crumbaugh v. Smock*, 1 Blackf. (Ind.) 305.

⁵ *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Wis. 307.

⁶ *Durkee v. Stringham*, 8 Wis. 1.

⁷ *Jones v. Yoakam*, 5 Neb. 265.

⁸ *Bull v. Shaw*, 48 Cal. 455.

⁹ Sec. 13 of the Act of Congress, Sept. 4, 1841 (U. S. Stat. at Large, p. 456), provides that before an entry shall be allowed the claimant shall make oath that "he has not directly or indirectly made any agreement or contract, in any manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure in whole or in part to the

178. Statutory mortgage. — A mortgage may be constituted by act of legislature, as where a railroad company accepted certain bonds issued under an act which declared that the bonds should “constitute a first lien and mortgage upon the road and property” of the company. The word property includes all the lands of the company, and any sale made by it is subject to the mortgage.¹

The bonds of a corporation, pledging its real and personal property for the payment of the debt, are treated in equity as a mortgage.²

3. *By Deposit of Title Deeds.*

179. An equitable mortgage may be created by deposit of the title deeds of a legal or an equitable estate as security for the payment of money.³ This method of creating a lien upon land is of much more frequent use in England than in this country. There, in the absence of a general system of recording, the possession of the title deeds of an estate is evidence of title. A transfer cannot be made without them. No one is supposed to have the right to retain them, unless he has a legal or equitable claim to the estate they represent. In all transfers of real estate the original deeds go with the property as evidences of title, and their examination by the solicitor of the parties is a prerequisite to every sale. Except in the counties of Middlesex and York, there are no registries where search can be made to ascertain the titles to lands, with the exception of copyhold titles, which are always to be found recorded in the manor courts. The only security which the purchaser has for the validity of his grantor's title is possession of the deeds which establish it.

In the United States, however, the reason for this doctrine does not exist. The registry system dispenses with the necessity of any production of title deeds, and supplies all the evidence to protect both vendor and vendee. It furnishes at once a true statement of the present condition of all legal rights to land, and

benefit of any person except himself.” And it also provides, that “any grant or conveyance which he may have made, except in the hands of a *bonâ fide* purchaser for valuable consideration, shall be null and void.” *Warren v. Van Brunt*, 19 Wall. 646; *Brewster v. Madden*, 15 Kans. 249; *McCue v. Smith*, 9 Minn. 252.

¹ *Wilson v. Boyce*, 92 U. S. 320.

² *White Water Valley Co. v. Vallette*, 21 How. 414.

³ *Russel v. Russel*, 1 Bro. C. C. 269; *Pye v. Daubuz*, 2 Dick. 759; *Whitbread v. Jordan*, 1 Y. & C. 303; *Mandeville v. Welch*, 5 Wheat. 277; *Jarvis v. Dutcher*, 16 Wis. 307; *Carey v. Rawson*, 8 Mass. 159.

if an original conveyance is ever lost or destroyed, a copy from the record is received as an equivalent.¹

180. The doctrine in England is well established, although it has been received with considerable disapprobation. "Now, since the case of *Russel v. Russel*," says Kindersley, V. C.,² "this is well settled: that supposing A., owing money to B., deposits the title deeds of his estate with B. for the purpose of a security, even without any writing, it is a good equitable mortgage; it gives B. a lien; and notwithstanding the expressions of regret of Lord Eldon that the law should be so, even in his time, we find him saying he could not disturb it; since that time it has been acted upon over and over again. That doctrine cannot now then be disturbed."

181. The legal effect of the deposit is, that the mortgagor contracts that his interest in the land shall be liable for the debt, and that he will make such a mortgage or conveyance as may be necessary to vest that interest in the mortgagee.³ It binds whatever interest he has in the whole property described in the title deeds. It does not imply that he will make perfect title to the property, but that he will give effect to the interest he has in it at the time, or may acquire afterwards during the deposit by the discharge of an incumbrance upon it,⁴ or the like. One holding title deeds as indemnity against contingent liabilities is not entitled to a formal mortgage before he has paid anything on account of such liability; but is entitled to a memorandum giving the terms of the deposit.⁵

The deposit may be made to cover subsequent advances by a subsequent parol agreement to that effect between the parties, without a return of the deeds and a new deposit of them.⁶

¹ *Probascio v. Johnson*, 2 Disney (Ohio), 96, 98.

² In *Lacon v. Allen*, 3 Drew. 579, 582. And see *National Bank of Australasia v. Cherry*, L. R. 3 P. C. C. 299; *Kensington*, ex parte, 2 V. & B. 79.

³ *Pryce v. Bury*, 2 Drew. 41, 42, per Kindersley, V. C.

⁴ Ex parte Bisdee, re Baker, 1 M., D. & De G. 333.

⁵ *Sporle v. Whayman*, 20 Beav. 607.

⁶ Ex parte Langston, 17 Ves. 227; *Baynard v. Woolley*, 20 Beav. 586; Ex parte Kensington, 2 V. & B. 79, 84.

In the latter case Lord Eldon said: "In the cases alluded to I went the length of stating, that, where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be too thin, that you should not have the benefit of such an agreement

In this respect an equitable mortgage is a broader security than a legal one; for a legal mortgage cannot be enlarged in its effect by a subsequent parol agreement that it shall secure further advances; and although the mortgagee holds the title deeds, he is not entitled to say that he holds them as a deposit,¹ unless the parties make an express agreement that they shall be so held.²

182. It is not necessary that every deed relating to the property should be deposited;³ nor is it necessary that they should show a title in the mortgagor by including the deed by which he acquired title.⁴ A deposit of the title deeds omitting the latter deed has priority over a subsequent deposit of the latter deed alone.⁵

183. Presumption of the purpose of the deposit. — It is held that even a deposit for the purpose of preparing a legal mortgage creates an equitable mortgage.⁶ “The principle of an equitable mortgage is,” said Lord Eldon,⁷ “that the deposit of the deeds is evidence of the agreement; but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?”

Where no written contract or memorandum accompanies the deposit, the presumption that a mortgage was intended, arising from the possession of the deeds, may be rebutted by parol evidence of the circumstances under which the deeds were left, and of the intention of the parties in the matter.⁸ Of course a state-

unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, and a redelivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien, within the principle of these cases.”

¹ Ex parte Hooper, re Hewett, 1 Mer. 7.

² Re Henry, ex parte Crossfield, 3 Ir. Eq. 67.

³ Ex parte Wetherell, 11 Ves. 401; *Lacon v. Allen*, 3 Drew. 582. In the latter case, Kindersley, V. C., said: “The question is, is it necessary that every title deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In each case we

must judge whether the instruments deposited are material parts of the title; and if they are, it is not necessary to say there are other deeds material, if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage.”

⁴ *Roberts v. Croft*, 24 Beav. 223; aff. 2 De G. & J. 1.

⁵ *Roberts v. Croft*, *supra*.

⁶ Ex parte Hooper, 1 Mer. 7; 19 Ves. 477; *Hockley v. Bantock*, 1 Russ. 141.

⁷ Ex parte Bruce, 1 Rose, 374; and see Ex parte Wright, 19 Ves. 258.

⁸ Ex parte Langston, 17 Ves. 227; *Lucas v. Darrien*, 1 Moo. 29; 7 Taunt. 278.

ment in writing of the purpose for which the deposit was made cannot be contradicted.¹

184. Law of place of contract governs. — When a citizen of a foreign country, by the law of which a lien cannot be created in this way, being in England, there makes a deposit of title deeds as security, his contract is governed by the law of England.²

185. In America the doctrine of a mortgage by deposit of title deeds has been adopted only to a very limited extent. Generally, something more is required than a mere verbal agreement or understanding that the creditor is to hold them as security or indemnity. To create a lien upon land in this way would be, it is declared, to repeal judicially the statutes of frauds and perjuries, making void sales not evidenced by writing. The doctrine, moreover, is not compatible with the registry system.

The attempts to apply the doctrine have not been very numerous, it being generally understood that it has no application here. The doctrine, therefore, may be considered as generally rejected, so far as it sustains a mortgage upon a verbal or implied promise in connection with the deposit of the deeds.³

186. Yet in several cases mortgages created in this way have been sustained. — The deposit of a deed, conveying the legal title to an estate as security for the amount of a mortgage released by the person receiving the deposit, was held to constitute an equitable mortgage, as between the original parties and those subject to their equities.⁴ A court of equity in such case will not compel the holder of the deeds to deliver them up until he has received payment of the debt for which they were pledged.⁵ On the contrary it will establish the lien and enforce a sale of the

¹ *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

² *Ex parte Holthausen, re Scheibler*, L. R. 9 Ch. 722. See *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 303. See, also, *Ex parte Pollard*, in re Courtney, Mon. & C. 239.

³ *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Meador v. Meador*, 3 Heisk. (Tenn.) 562; *Vannmeter v. McFaddin*, 8 B. Mon. (Ky.)

438; *Gothard v. Flynn*, 25 Miss. 58. The question was previously raised in Mississippi, in *Williams v. Stratton*, 10 Sm. & M. 418.

⁴ *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. (N. Y.) Ch. 9.

⁵ See *Griffin v. Griffin*, 18 N. J. Eq. 104, decided with reference to New York law.

depositor's interest, and the interest of those subject to this equity.¹ A suit in equity is the proper means to establish the lien, and the decree should be for a sale, if the debt be not paid by a given day.²

187. A written memorandum makes the deposit a mortgage. — But even where a deposit of title deeds upon a verbal agreement, that they shall be held as security for a debt, does not constitute an equitable mortgage, a written agreement to the same effect accompanying the deeds will make the transaction a mortgage.³ As already noticed, such written agreement alone without the deposit of title deeds is regarded as an equitable mortgage.

188. How an equitable mortgage is enforced. — Where an equitable mortgage is created by a deposit of title deeds or other equitable transfer, the remedy of the mortgagee, to cut off the equity of redemption, is by a suit in equity.⁴ When, however, a mortgage is created by a conveyance legal in form of an equitable estate, it may be foreclosed in the ordinary way.

When a mortgage is effected by an assignment of an executory contract of purchase, a foreclosure and sale operate only to transfer the debt to the purchaser, who becomes in equity the assignee of the mortgagor's contract, and entitled to the full benefit of it without redemption. Such a mortgage is ineffectual to transfer the legal title, although the mortgagor may have subsequently acquired that. It can only be enforced as an equitable lien.⁵

¹ Hackett v. Reynolds, *supra*.

² Jarvis v. Dutcher, 16 Wis. 307.

³ Luch's Appeal, 44 Pa. St. 519; Edwards v. Trumbull, 50 Pa. St. 509.

⁴ Mowry v. Wood, 12 Wis. 413; Jarvis

v. Dutcher, 16 Wis. 307.

⁵ Stewart v. Hutchinson, 29 How. (N. Y.) Pr. 181.

CHAPTER VI.

LIENS FOR PURCHASE MONEY.

PART I.

THE VENDOR'S IMPLIED LIEN.

1. *Nature and Extent of the Lien.*

189. **Nature of the lien.**—It is a doctrine of the English courts of chancery that a vendor has a lien upon the land sold by him for the purchase money, as against the vendee and his heirs, although he has taken no distinct agreement or separate security for it. There is a natural equity, it is said, that the land shall stand charged with so much of the purchase money as is not paid at the time of the conveyance.¹ It is also said that the principle of it originates in trust.² “Upon principle,” says Lord Eldon, “without authority, I cannot doubt that it goes upon this, that a person having got the estate of another shall not, as between them, keep it, and not pay the consideration.”³

¹ *Chapman v. Tanner*, 1 Vern. 267, per the Lord Keeper; *Warren v. Fenn*, 28 Barb. (N. Y.) 334, per Potter, J.: “It has become one of the best established principles of natural equity,—that estates are to be regarded as unconscientiously obtained when the consideration is not paid.”

² *Blackburn v. Gregson*, 1 Bro. Ch. 420, per Lord Loughborough: “Lord Bathurst doubted whether there was such an equitable lien. *Fawell v. Heelis*, Amb. 724. It becomes, therefore, of great consequence that it should be spoken to. It struck me always that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid, otherwise it is in trust for the

bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; then, if part be paid, is it not the same as to that which is unpaid?”

³ *Mackreth v. Symmons*, 15 Ves. 329. As to the time when this doctrine was established, Lord Eldon said: “I take that to have been the settled doctrine at the time of the decision of *Blackburn v. Gregson*; which case so far shook the authority of *Fawell v. Heelis* as to relieve me from any apprehensions that Lord Bathurst’s doctrine can be considered as affording the rule, to be applied between the vendor and vendee themselves, and persons claiming under them.” And see 1 White & Tudor’s Lead. Cas. in Eq. 89.

The only other ground upon which it has been suggested that the doctrine rests is the supposed intention of the parties; and on this point Chief Justice Gibson remarks:¹ "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the facts, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass."

190. As to the grounds of the doctrine, Chief Justice Gray,² in a careful review of the subject, says: "The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*." As to the natural equity of the lien the learned Chief Justice quotes with approval the argument of counsel in an English case,³ not answered by the court: "It is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

Chief Justice Gray, after examining the sources from which it has been supposed the doctrine of this lien is derived, says:⁴ "The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases, or to a limited extent, taken in execution for debt." In conclusion he

¹ Kauffelt v. Bower, 7 S. & R. (Pa.) 64, 76.

² Ahrend v. Odiorne, 118 Mass. 261.

³ In Blackburne v. Gregson, 1 Cox Ch. 90, 100; 1 Bro. Ch. 420.

Under the civil law, to which the origin

of the vendor's lien is referred, the purchase price of personal property was secured in the same way; but neither in England nor America has the rule been extended to personalty.

⁴ Ahrend v. Odiorne, 118 Mass., at 266.

decides against adopting in Massachusetts "a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties."¹

The objection, that the establishment of this lien is in contravention of the policy of the statute of frauds, is met by the reply that the lien is really a constructive trust, and that the statute is admitted to have no application to a trust arising in this manner.² "It is not, perhaps," says Judge Story, "so strong a case as that of a mortgage implied by a deposit of the title deeds of the real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained."³

191. How far adopted in this country.—The doctrine of a vendor's lien for the purchase money prevails in upwards of half in number of the states,⁴ and in the other states the doctrine has

¹ *Ahrend v. Odiorne*, 118 Mass. at 267.

² *Warren v. Fenn*, 28 Barb. (N. Y.) 334; *Wood v. Lester*, Ib. 152; *Mims v. Macon*, 3 Kelly (Ga.), 341; and see *Womble v. Battle*, 3 Ired. Eq. (N. C.) 183, per Nash, J.

³ 2 Story's Eq. Jur. § 1218, and see § 1221.

⁴ The doctrine prevails in:—

ALABAMA: *Gordon v. Bell*, 50 Ala. 213; *White v. Stover*, 10 Ala. 441; *Bradford v. Harper*, 25 Ala. 337; and also applied to an exchange; *Burns v. Taylor*, 23 Ala. 255; *Wood v. Sulleus*, 44 Ala. 686.

ARKANSAS: *Shall v. Biscoe*, 18 Ark. 142; *Campbell v. Rankin*, 28 Ark. 401; *Turner v. Horner*, 29 Ark. 440; *Lavender v. Abbott*, 30 Ark. 172; *Refeld v. Ferrell*, 27 Ark. 534.

But in *Harris v. Hanks*, 25 Ark. 510-517, the court say that a recent act of the legislature declares that no lien shall be allowed when the same is not reserved.

CALIFORNIA: *Salmon v. Hoffman*, 2 Cal. 138; *Sparks v. Hess*, 15 Cal. 186; *Burt v. Wilson*, 28 Cal. 632; *Gallagher v. Mars*, 50 Cal. 23.

It is also provided by statute that one who sells real estate shall have a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. Civil Code, 1872, § 3046.

COLORADO: *Francis v. Wells*, 2 Col. 660.

DISTRICT OF COLUMBIA: *Ford v. Smith*, 1 McAr. 592.

FLORIDA: *Bradford v. Marvin*, 2 Fla. 463.

ILLINOIS: *Moshier v. Meek*, 80 Ill. 79; *Keith v. Horner*, 32 Ill. 524; *Boynton v. Champlin*, 42 Ill. 57; *Dyer v. Martin*, 4 Seam. 148; *Wing v. Goodman*, 75 Ill. 159; *Kirkham v. Boston*, 67 Ill. 599; *Wilson v. Lyon*, 51 Ill. 166.

INDIANA: *Yaryan v. Shriner*, 26 Ind. 364; *Mattix v. Weand*, 19 Ind. 151; *Deibler v. Barwick*, 4 Blackf. 339.

IOWA: *Grapegether v. Fejervary*, 9 Iowa, 163; *McDole v. Purdy*, 23 Iowa, 277; *Johnson v. McGrew*, 42 Iowa, 555. But criticised in *Pierson v. David*, 1 Iowa, 23; *Porter v. City of Dubuque*, 20 Iowa, 440. Must be reserved in deed to avail

either been rejected from the beginning, or having prevailed at one time has since been expelled by statute,¹ although it may be

against grantee's conveyance. Rev. Stat. 1873, § 1940.

KENTUCKY: *Thornton v. Knox*, 6 B. Mon. 74; *Ledford v. Smith*, 6 Bush, 129; *Tiernan v. Tharman*, 14 B. Mon. 277; *Emison v. Risque*, 9 Bush, 24. But it is now provided by statute that the grantor shall not have a lien against *bonâ fide* purchasers and creditors unless he states in his deed what part of the consideration remains unpaid. Gen. Stat. 1873, p. 589.

MARYLAND: *Carr v. Hobbs*, 11 Md. 285.

MICHIGAN: *Payne v. Avery*, 21 Mich. 524; *Carroll v. Van Rensselaer*, Harr. (Mich.) 225.

MINNESOTA: *Duke v. Balme*, 16 Minn. 306; *Selby v. Stanley*, 4 Minn. 65.

MISSISSIPPI: *Dodge v. Evans*, 43 Miss. 570; *Pitts v. Parker*, 44 Miss. 247. It has been applied to a sale of a leasehold estate. *Richardson v. Bowman*, 40 Miss. 782.

MISSOURI: *Delassus v. Poston*, 19 Mo. 425; *Marsh v. Turner*, 4 Mo. 253; *Pratt v. Clark*, 57 Mo. 189.

NEW JERSEY: *Herbert v. Scofield*, 1 Stock. Ch. 492; *Corlies v. Howland*, 26 N. J. Eq. 311; *Dudley v. Matlack*, 14 Ib. 252.

NEW YORK: *Smith v. Smith*, 9 Abb. Pr. (N. S.) 420; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Chase v. Peck*, 21 N. Y. 581.

OHIO: *Williams v. Roberts*, 5 Ohio, 35; *Brush v. Kinsley*, 14 Ohio, 20; *Auketel v. Converse*, 17 Ohio St. 11.

OREGON: *Pease v. Kelly*, 3 Oreg. 417.

TENNESSEE: *Ross v. Whitson*, 6 Yerg. 50.

TEXAS: *Pinchain v. Collard*, 13 Tex. 333; *Briscoe v. Bronaugh*, 1 Tex. 326; *White v. Downs*, 40 Tex. 225; *Yarborough v. Wood*, 42 Tex. 91; *Brown v. Christie*, 689.

WISCONSIN: *Willard v. Reas*, 26 Wis. 540.

¹ The doctrine is rejected or not adopted in the following states: —

CONNECTICUT: Not adopted, and may be considered in doubt. *Atwood v. Vincent*, 17 Conn. 575; *Chapman v. Beardsley*, 31 Conn. 115; *Meigs v. Dimock*, 6 Conn. 464; *Watson v. Wells*, 5 Conn. 468. In the case first cited Church, J., said: "In this state, we have not yet had occasion to resort to it."

GEORGIA: Now abolished by statute, although it formerly existed. Code, 1873, § 1997; *Jones v. Janes*, 56 Ga. 325.

KANSAS: Denied. *Simpson v. Mundee*, 3 Kans. 172; *Brown v. Simpson*, 4 Ib. 76; *Smith v. Rowland*, 13 Ib. 245.

MAINE: Considered and rejected in *Gilman v. Brown*, 1 Mason, 192, 219; *Philbrook v. Delano*, 29 Me. 410, 415.

MASSACHUSETTS: Denied. *Gilman v. Brown*, *supra*; repudiated in *Ahrend v. Odiorne*, 118 Mass. 261.

NEW HAMPSHIRE: Its existence questioned in *Arlin v. Brown*, 44 N. H. 102.

NORTH CAROLINA: Denied. *Womble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton*, Ib. 259; *Cameron v. Mason*, 7 Ib. 180; though it had been adopted in earlier cases.

PENNSYLVANIA: Denied. *Kauffelt v. Bower*, 7 S. & R. 64; *Hepburn v. Snyder*, 3 Barr, 72; *Stephen's Appeal*, 38 Pa. St. 9.

RHODE ISLAND: Considered, but not adopted, in *Perry v. Grant*, 10 R. I. 334.

SOUTH CAROLINA: Denied. *Wragg v. Comp. Gen.* 2 Desau. 509, 520.

VERMONT: Judicially adopted in *Mally v. Slason*, 21 Vt. 271; but abolished by legislature immediately. St. of 1851, c. 47; Gen. Stat. 1862, c. 65, § 33.

VIRGINIA: Though it formerly existed, it is now abolished unless it be expressly reserved on the face of the conveyance. Code, 1873, c. 115, § 1.

WEST VIRGINIA: Abolished, unless it be expressly reserved on the face of the conveyance. Code, 1870, c. 75, § 1.

that in a few states the question of its existence has not been definitely decided. In the courts of the United States the doctrine has never been affirmed, except where established by the local law of the different states.¹ The doctrine, even in those states that have adopted it, has frequently been criticised and deplored, as inconsistent with the general policy prevailing in this country to make all matters of title depend upon record evidence.²

The doctrine is no more satisfactory now than it was in Lord Eldon's time; in fact, it is much less so. From the nature of the equity, there could be but few fixed rules regarding it; but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject that has not been somewhere denied; that hardly any two states can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions in the same state are irreconcilable.³ The remark of Lord Mansfield, that "The more we read, the more we shall be confounded," is not without its application here.

This is eminently a subject of case law. To a large degree each case is a law unto itself and unto no other case.

The inquiry in every case is, whether there are other equities superior to this lien, or whether it has been waived by any act of the party claiming it. "Its existence," says Mr. Justice Potter,⁴ "depends upon and is controlled by no well settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person; whether the party is not to be regarded as having waived it, or as having intended to

¹ Bayley v. Greenleaf, 7 Wheat. 46; M'Lean v. M'Lellan, 10 Pet. 625, 640; Chilton v. Braiden, 2 Black, 458.

² See Chief Justice Marshall's remarks in Bayley v. Greenleaf, 7 Wheat, 46, 51; per Treat, J., in Conover v. Warren, 1 Gilm. (Ill.) 498, 502; Yancey v. Mauck, 15 Gratt. (Va.) 300. And it was frequently condemned in the courts of Virginia before it was abolished by statute. McCandlish v. Keen, 13 Gratt. 615, 621.

³ It is to be noticed that, within a few

years, several states have abolished this implied lien, and that strong expressions of disapprobation of the doctrine have been used in others. Moreover, the practical tendency in the older states is to rely upon formal instruments for security when security is wanted. It may be doubted, therefore, whether this doctrine will long survive.

⁴ Fisk v. Potter, 2 Abb. (N. Y.) App. Dec. 138; 2 Keyes (N. Y.), 64.

waive or postpone it to another equity; or whether by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands."

192. The lien is presumed to exist in all cases unless an intention be clearly manifest that it shall not exist.¹ The vendee has the burden of repelling the presumption of a lien. It being a matter of intention, its existence depends upon the circumstances of each case. "What shall be sufficient to make a case in which the lien can be said not to exist," is always the inquiry to be made; and for this reason, so inconvenient and unsatisfactory is the doctrine that Lord Eldon said:² "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would and in what cases it would not exist."

193. **Extent of the lien.** — The lien exists to the extent of the purchase money against the vendee and his heirs; against his privies in estate, and against subsequent purchasers who have notice of it; against those who take a conveyance of the estate without advancing any new consideration, so that they are not, within the meaning of the rule of equity, purchasers for value; and against voluntary assignees also who are not *bonâ fide* purchasers.

It covers interest on the purchase money;³ but it does not give the vendor any claim to the profits of the land.⁴ If the vendor has been in receipt of the rents under an agreement that he should collect and apply them to the debt, his right to them will cease upon the vendee's bankruptcy.⁵

¹ Per Lord Eldon, in the leading case *Paige* (N. Y.), 382; *Wilson v. Lyon*, 51 before cited; *Gilman v. Brown*, 1 Mas. Ill. 166; *Dodge v. Evans*, 43 Miss. 570. 191, 213; *Garson v. Green*, 1 Johns. (N. Y.) Ch. 308; *Allen v. Bennett*, 8 Sm. &

² In the leading case before cited.

M. (Miss.) 672, 681; *Truebody v. Jacobson*, 2 Cal. 269; *Schnebly v. Ragan*, 7 Gill & J. (Md.) 120; *Clark v. Hall*, 7

³ *Succession of Richardson*, 10 La. Ann. 616.

⁴ *Little v. Brown*, 2 Leigh (Va.), 353; *Hall v. Scovel*, 10 Bank. Reg. 295.

⁵ *Hall v. Scovel*, *supra*.

The lien cannot be extended to any other indebtedness of the vendee arising from other transactions.¹ When a note is given in part for purchase money and in part for other consideration, it may be enforced as a lien for the part representing the unpaid price of the land, if it can be shown precisely what part of it was for that consideration.²

It has been held that this lien may arise upon the sale of a mere equitable interest.³

It is held to apply to sales made under process of law as well as to voluntary sales.⁴

The lien is sustained against the vendee's heirs, because if it was against conscience that he himself should have the land without paying for it, it is equally against conscience that his heirs should be allowed to hold it.⁵

The widow's right to dower in the estate is subject to the lien.⁶

The right of homestead is also subject to the lien.⁷

194. For unliquidated claim. — The lien does not exist as a security for an unliquidated and uncertain demand;⁸ as for instance an obligation to support the vendor for life,⁹ or to assume and pay the debt of another.¹⁰ It may be said, too, that when the sale is not made for a sum of money, but in consideration of a covenant or agreement to do certain things, the covenant or

¹ *Refeld v. Ferrell*, 30 Ark. 465.

² *Swain v. Cato*, 34 Tex. 395; *Russell v. McCormick*, 45 Ala. 587; and see *Harris v. Hanks*, 25 Ark. 510.

³ *Warren v. Fenn*, 28 Barb. (N. Y.) 333.

⁴ *Mims v. Macon, &c.* 3 Kelly (Ga.), 342.

⁵ *Bayley v. Greenleaf*, 7 Wheat. 46; *Cole v. Scot*, 2 Wash. (Va.) 141; *Shirley v. Sugar Refinery*, 2 Edw. (N. Y.) 505; *Warner v. Van Alstyne*, 3 Paige (N. Y.), 513.

In California, by statute, the lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith. Civil Code, § 2048.

⁶ *Fisher v. Johnson*, 5 Ind. 492.

⁷ *McHendry v. Reilly*, 13 Cal. 75.

⁸ *Payne v. Avery*, 21 Mich. 524; *Pat-*

erson v. Edwards, 29 Miss. 67; *Sears v. Smith*, 2 Mich. 243; *Van Doren v. Todd*, 2 Green (N. J.) Ch. 397.

But in an Iowa case the lien was allowed and enforced in an exchange of lands, for a deficiency in the value of the lands taken in exchange, on account of the fraudulent representations of the other party; *McDole v. Purdy*, 23 Iowa, 277; and in a case before the Supreme Court of New York, land having been sold to a corporation to be paid for in its stock, upon failure to deliver the stock the lien was established. *Dubois v. Hull*, 43 Barb. 26.

⁹ *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.), 522; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Chase v. Peck*, 21 N. Y. 581.

¹⁰ *Chapman v. Beardsley*, 31 Conn. 115.

agreement is then itself the consideration, and in obtaining the covenant or agreement the vendor has been paid all he contracted for.¹ And so if other property be taken in exchange, the title of which is covenanted by the vendee, it is considered that the vendor has evinced an intention to rely upon that remedy, and has waived his lien.²

195. As affected by agreements of the parties. — This lien does not spring from any agreement of the parties, and is wholly independent of any such agreement. Moreover, the fact that there is a verbal agreement of the parties that the vendee shall reconvey the land if he does not pay the purchase price, does not prevent the enforcement of the lien; for such an agreement is void under the statute of frauds.³

196. Parol evidence that no lien was intended. — It seems that it may be shown by parol evidence, that the bond or note was accepted in full discharge of the price of the land. "It is the vendor," says Sir John Leach,⁴ "who in the first place attempts to raise an equity against the allegation of the deed; and if the vendor be permitted to repel the effect of the deed by showing that the price was not paid, it must necessarily follow, that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made."

Parol evidence in such case does not vary or contradict any writing, as the lien does not exist by writing, and no writing is required to release it. Any act or declaration of the vendor which shows that he does not rely upon his lien now, or that he never relied upon it, or that he has abandoned the lien, will prevent its being established. Thus, where a father had conveyed land to his son, taking his notes for the price, and afterwards declared that he did not intend to collect the notes, it was held that such declaration clearly showed he did not intend to rely upon the lien, or to enforce it, and, consequently, his representatives after his decease were not allowed to enforce it.⁵

¹ *Buckland v. Poeknell*, 13 Sim. 406; *Dixon v. Gayfere*, 17 Beav. 421; 21 Ib. 118.

² *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92; *Coit v. Fongera*, 36 Ib. 195.

³ *Gallagher v. Mars*, 50 Cal. 23

⁴ In *Winter v. Lord Anson*, 1 S. & S. 434; *Perry v. Grant*, 10 R. I. 334; *Doolittle v. Jenkins*, 55 Ill. 400; and see *Kirkham v. Boston*, 67 Ill. 599.

⁵ *Moshier v. Meek*, 80 Ill. 79.

197. **Acknowledgment of receipt of money.**—The lien is not waived by any acknowledgment of the receipt of the consideration, whether that be contained in the body of the deed, or on the back of it, or in a separate instrument.¹ One purchasing from the vendee, finding a recital of payment of the consideration in the deed, may well infer that it has in fact been paid; but if he knows to the contrary the acknowledgment does not protect him. Evidence that it was not paid may be given, and then notice of this fact to the purchaser may be brought home to him.²

2. *How defeated and waived.*

198. **The lien is not waived by taking a note or bond or other personal obligation of the purchaser alone, for the amount of the unpaid purchase money.**³ The taking of such written evidence of the debt does not by itself show an intention to rely exclusively upon the purchaser's credit. Nor does the fact, that the time of payment is by such obligation postponed, affect the lien; even if postponed during the lifetime of the vendor.⁴ But when it appears that the bond or note is all that the vendor intended to receive for the conveyance made by him, and that such personal security was substituted for the purchase money, there is no lien.⁵ The fact that the note or bond is received expressly in consideration of the conveyance, and in full satisfaction for it, may appear

¹ *Mackreth v. Symmons*, 15 Ves. 329; *Cuney v. Bell*, 34 Tex. 177; *Gilman v. Brown*, 1 Mas. 192, 214; *Scott v. Orbison*, 21 Ark. 202; *Holman v. Patterson*, 29 Ark. 357; *Sheratz v. Nicodemus*, 7 Yerg. (Tenn.) 9; *Tribble v. Oldham*, 5 J. J. Marsh. (Ky.) 137, 144.

² *Gordon v. Manning*, 44 Miss. 756.

³ *Mackreth v. Symmons*, 15 Ves. 329; *Manly v. Slason*, 21 Vt. 271; *White v. Williams*, 1 Paige (N. Y.), 502; *Garson v. Green*, 1 Johns. (N. Y.) Ch. 308; *Corlies v. Howland*, 26 N. J. Eq. 311; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Brinkerhoff v. Vansciven*, 3 Green (N. J.) Ch. 251; *Evans v. Goodlet*, 1 Blackf. (Ind.) 246; *Aldridge v. Dunn*, 7 Ib. 249; *Denny v. Steakly*, 2 Heisk. (Tenn.) 156; *Taylor v. Hunter*, 5 Humph. (Tenn.) 569; *Clark*

v. Hunt, 3 J. J. Marsh. (Ky.) 553, 558; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74; *Honore v. Bakewell*, Ib. 67; *Christian v. Austin*, 36 Tex. 540; *Pinchain v. Col-lard*, 13 Tex. 333; *Bradford v. Harper*, 25 Ala. 337; *Plowman v. Riddle*, 14 Ala. 169; *Baum v. Grigsby*, 21 Cal. 172; *Andrews v. Scotton*, 2 Bland (Md.), 629.

The rule applies equally to a check or draft; *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67; or certificate of deposit. *Mims v. Macon, &c. R. R. Co.* 3 Ga. 333.

⁴ *Winter v. Lord Anson*, 3 Russ. 488, reversing S. C. 1 S. & S. 434; *Redford v. Gibson*, 12 Leigh (Va.), 332, 347.

⁵ *Dixon v. Gayfere*, 17 Beav. 421; 21 Ib. 118; *Keith v. Wolf*, 5 Bush (Ky.), 646.

by the deed of conveyance,¹ or by a separate writing,² or from the circumstances of the case.³

A lien upon land conveyed to a married woman, and partly paid for by her out of her own funds, has been regarded as waived by taking the husband's note for the balance.⁴

The intention to waive the lien, when only the personal obligation of the vendee is taken for the purchase money, may be shown by an express agreement of the parties, or by any expressions inconsistent with an intention to continue it.⁵

199. The lien is defeated by a conveyance by the vendee to one who purchases in good faith, without notice of the lien.⁶ It is a secret, invisible lien, known only to the vendor and vendee, and to those to whom they may have communicated the fact of its existence. "To the world," says Chief Justice Marshall,⁷ "the ven-

¹ *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Packnell*, 13 Sim. 406.

² *Dixon v. Gayfere*, *supra*.

³ *Earl of Jersey v. Briton Ferry Floating Dock Co.* 7 L. R. Eq. 409.

⁴ *Cowl v. Varnum*, 37 Ill. 181.

⁵ *Winter v. Lord Anson*, 1 S. & St. 434, 445; *Ex parte Parkes*, 1 G. & J. 228.

In IOWA it is provided by statute that no vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executors, or assigns to enforce such lien. Sect. 1940, Rev. of 1873.

In KENTUCKY it is provided that when any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same, against *bonâ fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid. Gen. Stat. of Ky. 1873, p. 589, § 24.

As to what is a sufficient reservation, under this provision, see *Keith v. Wolf*, 5 Bush (Ky.), 646; *Ledford v. Smith*, 6 Ib. 129.

When, by mistake, reservation was not made. *Phillips v. Skinner*, 6 Bush (Ky.), 662.

Notice to the purchaser in any other way, that the purchase money is not paid, will not affect him. *Chapman v. Stockwell*, 18 B. Mon. 650.

The amount must be expressly stated. *Taylor v. Ford*, 1 Bush, 44; *Maupin v. McCormick*, 2 Bush, 206; *Gritton v. McDonald*, 3 Met. (Ky.) 252; *Cottman v. Martin*, 1 Ib. 563. A covenant to pay all the vendor's debts, the amount of which is not stated, is not a sufficient reservation. *Long v. Burke*, 2 Bush, 90.

⁶ *Cator v. Earl of Pembroke*, 1 Bro. C. C. 302; *Honston v. Stanton*, 11 Ala. 412; *Adams v. Buchanan*, 49 Mo. 64; *Moshier v. Meek*, 80 Ill. 79; *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, per Potter, J.; *Bayley v. Greenleaf*, 7 Wheat. 46, in which the early cases are examined, and the *dictum* of Sugden, that purchasers are bound although they had no notice, is declared not to be justified or supported. Mr. Justice Potter, in the New York case cited above, says of the doctrine declared by Sugden, that it had never been held by any court of authority, within the limits of his research.

⁷ *Bayley v. Greenleaf*, *supra*.

dee appears to hold the estate divested of any trust whatever ; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bonâ fide* creditors."

Moreover, to allow this latent and unwritten lien to prevail against purchasers and mortgagees, who in good faith invest their money upon the faith of an unincumbered title of record, would be to discredit and subvert the system of registration which in this country is universally adopted as the evidence and safeguard of every title.

200. Or by a mortgage. — A vendor's lien having no validity as against a purchaser for value without notice, it has no validity against one who takes a mortgage as security for a debt contracted at the time, for he is then a purchaser.¹ Even an equitable mortgage — one for instance arising by means of a mere contract for a mortgage, and nothing more, or by a deposit of title deeds, where, as in England, such a deposit creates an equitable mortgage — may be entitled to priority over the lien, although the lien be prior in time. In contests between persons having only equitable interests, priority of time is the ground of preference last resorted to, or in other words, only when their equities are in all other respects equal ; and the circumstance that the equitable mortgagee has possession of the title deeds has been held to give him the better equity, and to make the maxim, "*Qui prior est tempore, potior est jure*," inapplicable.²

¹ *Short v. Battle*, 52 Ala. 456 ; *Grown v. Behn*, 10 B. Mon. (Ky.) 383.

² *Rice v. Rice*, 2 Drew. 73, per Vice Chancellor Kindersley : —

"The vendors, when they sold the estate, chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by

which they declared, in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase

But the lien will still attach to the equity of redemption of the vendee, and upon a foreclosure of the mortgage the lien may be enforced upon the surplus.¹ If the mortgage be given merely to secure a preëxisting debt, it will not prevail against the lien.² The mortgagee is not then a purchaser in good faith for value.

When the consideration of a mortgage is in part a debt already due, and in part a new debt created at the date of the mortgage, the mortgage will be protected against the lien only as to the new debt.³

201. When a judgment lien takes precedence. — A judgment creditor, who advances his money on the faith of an unincumbered title, is regarded as a *quasi* purchaser for a valuable consideration, and having no notice of the lien, his judgment lien is sustained against the lien of the vendor.⁴

Neither is the lien allowed to affect the rights of the vendee's creditors who have attached the land without notice of the lien.⁵

But on the other hand it is held that a judgment creditor takes only what belonged to his debtor, and takes, subject to all the

money, and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal, and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they were concerned, the mortgagor had an absolute indefeasible title both at law and in equity." And see *Wilson v. Keating*, 4 De G. & J. 588.

¹ *Brown v. Porter*, 2 Mich. N. P. 12.

See *Arnold v. Patrick*, 6 Paige (N. Y.), 310.

² *Chance v. McWhorter*, 26 Ga. 315.

³ *Pepper v. George*, 51 Ala. 190.

In this case the court held, partly with reference to the terms of a statute, that a mortgage given in security of a preëxisting debt, although the time of payment is extended and a pending suit is discontinued, does not constitute the mortgagee a purchaser for value, so as to entitle him to protection against an outstanding lien.

⁴ *Bayley v. Greenleaf*, 7 Wheat. 46; *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Taylor v. Baldwin*, 10 Ib. 626; *Cook v. Banker*, 50 N. Y. 655; *Robinson v. Williams*, 22 N. Y. 380; *Cook v. Kraft*, 3 Lans. (N. Y.) 512; *Johnson v. Cawthorn*, 1 Dev. & B. (N. C.) Eq. 32; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249; *Webb v. Robinson*, 14 Ga. 216; *Gann v. Chester*, 5 Yerg. (Tenn.) 205.

⁵ *Allen v. Loring*, 34 Iowa, 499; *Porter v. City of Dubuque*, 20 Iowa, 440; *Adams v. Buchanan*, 49 Mo. 64.

equities which exist in favor of the vendor.¹ The judgment creditor is said to have only an equity, and the vendor's equity, being the better equity, must prevail.

202. The vendee's assignee in bankruptcy takes the property subject to the lien, for it is a settled principle that he takes only the rights and estate of the bankrupt, and subject to all the equities which affected him.² An assignee of the vendee, under a general assignment for the benefit of creditors, will also take subject to the vendor's lien.³ After such assignment in bankruptcy, or for the benefit of creditors, a bill to enforce the lien should be brought against the assignee and not against the bankrupt.

203. A legal lien accruing at same time preferred. — As between this latent lien in equity, and a legal lien by mortgage arising at the same time, the latter will prevail.⁴ Such a mortgage may attach to the property the moment the land is conveyed to the mortgagee, as for instance when a railroad company has executed and recorded a mortgage of all its real estate, both that which it holds at the time and that which it may acquire thereafter; it is well settled that the mortgage attaches to the after acquired lands as soon as the conveyance is made to the company. The mortgage lien is preferred to the vendor's lien for the purchase money in such case. Where the conveyance in such case was made by an agent of the company, who knew of the existence of the mortgage, there was a further reason for rejecting his claim of a lien, for he was claimed to have waived it as against the mortgage.⁵

204. Purchaser with notice. — Any one acquiring an interest in land affected by a vendor's lien with notice of its existence takes it subject to the lien. Upon this point Lord Eldon said: ⁶

¹ *Walton v. Hargroves*, 42 Miss. 18; *Thompson v. McGill*, 1 Freem. (Miss.) 401; *Lewis v. Caperton*, 8 Gratt. (Va.) 148.

² *Bowles v. Rogers*, 6 Ves. 95; *Ex parte Peake*, 1 Madd. 346; *In re Perdue*, 2 Bank. Reg. 183; and see *Corlies v. Howland*, 26 N. J. Eq. 311.

³ *Fawell v. Heelis*, Amb. 724; *Shirley v. Sugar Refinery*, 2 Edw. (N. Y.) 505;

Walton v. Hargroves, 42 Miss. 18; *Pearce v. Foreman*, 29 Ark. 563; *Warren v. Fenn*, 28 Barb. (N. Y.) 332; *Green v. Demoss*, 10 Humph. (Tenn.) 371; *Brown v. Vanlier*, 7 Ib. 239.

⁴ *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138.

⁵ *Fisk v. Potter*, *supra*.

⁶ *Mackreth v. Symmons*, 15 Ves. 329; *Carr v. Hobbs*, 11 Md. 285. And see,

“There is no doubt that a third person, having full knowledge that the other got the estate without payment, cannot maintain, that though a court of equity will not permit him to keep it, he may give it to another person without payment.”

The notice may be actual, as where the purchaser is informed of the fact of the purchase by the parties,¹ or constructive, through the pendency of a suit to enforce the lien,² or through recitals in a deed under which the purchaser claims. He is bound by any notice which would put a reasonable man upon inquiry.³ If he has notice that some part of the purchase money is unpaid, it is incumbent upon him to ascertain how much remains unpaid, and he is chargeable with notice of the lien whatever its extent may be.⁴

The purchaser must pay a new consideration to entitle him to the position of an innocent purchaser for value, and to defend against the equitable lien of the vendor.⁵

205. Notice by recitals in deed. — When the deed, under which the vendee holds, shows by its recitals that the purchase money has not been paid, although the deed be not recorded, a purchaser from him is affected with notice of the outstanding vendor's lien; for he can only make title by a deed which leads him to this fact, and he must therefore be presumed to be cognizant of it.⁶

The fact that the vendee, in his deed conveying the land to another, recites his purchase of the estate from the first vendor, does not affect the purchaser with notice, if the recital does not show that the estate was not paid for.⁷ Nor does the fact that the ven-

also, *Corlies v. Howland*, 26 N. J. Eq. 311; *Dodge v. Evans*, 43 Miss. 570; *Merritt v. Wells*, 18 Ind. 171; *Webb v. Robinson*, 14 Ga. 216; *Burt v. Wilson*, 28 Cal. 632; *Shall v. Biscoe*, 18 Ark. 142; *Bulger v. Holly*, 47 Ala. 453; *Sampley v. Watson*, 43 Ala. 377; *Gordon v. Bell*, 50 Ala. 213; *Champion v. Brown*, 6 Johns. (N. Y.) Ch. 398.

¹ *Wilson v. Lyon*, 51 Ill. 166.

² *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277.

³ *Briscoe v. Bronaugh*, 1 Tex. 326; *Parker v. Foy*, 43 Miss. 260; *Autrey v. Whitmore*, 31 Tex. 623.

⁴ *Baum v. Grigsby*, 21 Cal. 176; *Manly v. Slason*, 21 Vt. 271.

⁵ *Perkins v. Swank*, 43 Miss. 349; *Walton v. Hargroves*, 42 Miss. 18; *Chance v. McWhorter*, 26 Ga. 315.

⁶ *Cordova v. Hood*, 17 Wall. 1; *Masich v. Shearer*, 49 Ala. 226; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277; *Thornton v. Knox*, 6 Ib. 74; *Daughaday v. Paine*, 6 Minn. 443; *McRimmon v. Martin*, 14 Tex. 318; *McAlpine v. Burnett*, 23 Tex. 649.

⁷ *Cator v. Earl of Pembroke*, 1 Bro. C. C. 302; *Eyre v. Sadleir*, 14 Ir. Ch. 119; 15 Ib. 1.

dor remains in possession of the land as lessee affect the purchaser with notice that the purchase money remains unpaid.¹

The fact that a purchaser has the conveyance made to another person, as for instance his wife or daughter, but gives his own notes for the purchase money, does not make any difference with enforcement of the lien.² Such third person is a mere volunteer, not a purchaser without notice, and for value. He is but a recipient of the title, and there is no reason why the lien should not exist against him.

206. Defence of purchase without notice.—A purchaser who defends against the lien, on the ground that he purchased for value without notice, should in his answer briefly state the deed of purchase, the date, the parties, contents, and consideration paid, and that he is seised in fee and possession, with a distinct averment that the consideration was paid in good faith, and was actual, independent of the recital of the deed.³ He should deny notice previous to and down to the time of paying the money and the delivery of the deed; and if notice be specially charged, he should deny all the circumstances referred to from which notice can be inferred. Whether notice be charged in the bill or not, it should be positively denied in the answer.

This defence is not available to the purchaser, if the purchase money has not been actually paid before notice was received.⁴

207. Waived by taking distinct security.—A vendor's lien is lost by taking a mortgage, or other independent security for the purchase money,⁵ unless there be an express agreement that it

¹ *White v. Wakefield*, 7 Sim. 401.

² *Doyle v. Orr*, 51 Miss. 229; *Davis v. Pearson*, 44 Miss. 508; *Russell v. Watt*, 41 Miss. 609; *Upshaw v. Hargrove*, 6 S. & M. (Miss.) 286; *Marsh v. Turner*, 4 Mo. 253; *Taylor v. Alloway*, 3 Litt. (Ky.) 216.

³ *Pearce v. Foreman*, 29 Ark. 563, and cases cited; *Wells v. Morrow*, 38 Ala. 125, 128, and cases cited.

⁴ *Campbell v. Roach*, 45 Ala. 667.

⁵ *Nairn v. Prowse*, 6 Ves. 752; *Follett v. Reese*, 20 Ohio, 546; *McGonigal v. Plummer*, 30 Md. 422; *Fonda v. Jones*, 42 Miss. 792; *Mayham v. Coombs*, 14

Ohio, 428; *Richardson v. Ridgely*, 8 Gill & J. (Md.) 87; *Louis v. Covilland*, 21 Cal. 178; *Denny v. Steakly*, 2 Heisk. (Tenn.) 156; *Adams v. Buchanan*, 49 Mo. 64; *Durette v. Briggs*, 47 Mo. 356; *Carrico v. Farmers' & Merchants' Nl. Bank*, 33 Md. 235; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Van Doren v. Todd*, 2 Green's Ch. (N. J.) 397; *Brinkerhoff v. Vanseiven*, 3 Ib. 251; *Dibblee v. Mitchell*, 15 Ind. 435; *Parker County v. Sewell*, 24 Tex. 239; *Brown v. Christie*, 35 Tex. 689; *McDonough v. Cross*, 40 Tex. 251; *Kirkham v. Boston*, 67 Ill. 599; *McLaurie v. Thomas*, 39 Ill. 291; *Richards v.*

shall not have this effect.¹ Taking a mortgage upon the same property would obviously exclude the holding of a lien upon it at the same time,² and if a mortgage be taken upon a part of the estate purchased, the inference is that it was not intended that the rest of it should be affected by the lien.³ If a mortgage be taken upon another estate of the vendee, the obvious intention of burdening one estate is that the other shall remain free and unincumbered.⁴ The same inference would be drawn from the taking of any pledge for the purchase money; or from taking the personal obligation of some other person alone, or in addition to that of the vendee.⁵

A vendor, who has taken other land conveyed to him with covenants of warranty by the vendee, is deemed to have waived his lien.⁶ The delivery of such other deed in escrow is a waiver of

Laming, 27 Ill. 431; Warner v. Scott, 63 Ill. 368; Fish v. Howland, 1 Paige (N. Y.), 20; Vail v. Foster, 4 N. Y. 312.

¹ Daughaday v. Paine, 6 Minn. 443.

² Mattix v. Weand, 19 Ind. 151; Camden v. Vail, 23 Cal. 633; Little v. Brown, 2 Leigh (Va.), 353; Young v. Wood, 11 B. Mon. (Ky.) 123; Shelby v. Perrin, 18 Tex. 515.

In Pease v. Kelly, 3 Oreg. 417, the court said that both liens could not exist at the same time, and that the mortgage lien being the more definite and the higher security, repelled the equitable lien. But see *contra*, Boos v. Ewing, 17 Ohio, 500; Anketel v. Converse, 17 Ohio St. 11; Stafford v. Van Rensselaer, 9 Cow. (N. Y.) 316; Wasson v. Davis, 34 Tex. 159; Linville v. Savage, 58 Mo. 248; Morri v. Pate, 31 Mo. 315.

³ Capper v. Spottiswoode, Tamlyn, 21; Boud v. Kent, 2 Vern. 281; Brown v. Gilman, 4 Wheat. 256; Phillips v. Saunderson, 1 Sm. & M. (Miss.) Ch. 462; Fisk v. Howland, 1 Paige (N. Y.), 30; Hadley v. Pickett, 25 Ind. 450; Dudley v. Dickson, 14 N. J. Eq. 252.

But when the purchase money does not consist of one entire liability, but of several distinct liabilities, accruing severally, and the corresponding liens are not divisible merely, but are essentially divided and

distinct, it has been held that the taking of security for one lien does not waive another lien. De Forest v. Holum, 38 Wis. 516.

⁴ Sir Wm. Grant, in Nairn v. Prowse, 6 Ves. 752.

⁵ Wilson v. Graham, 5 Munf. (Va.) 297; Williams v. Roberts, 5 Ohio, 35; Campbell v. Henry, 45 Miss. 326; Boon v. Murphy, 6 Blackf. (Ind.) 273; Carrico v. Farmers' Bank, 33 Md. 235; McGonigal v. Plummer, 30 Md. 422; Boynton v. Camplin, 42 Ill. 57; Vail v. Foster, 4 N. Y. 312; Baum v. Grigsby, 21 Cal. 172; Schwarz v. Stein, 29 Md. 112; Sanders v. McAfee, 41 Ga. 684; Hummer v. Schott, 21 Md. 307; Fonda v. Jones, 47 Miss. 792; Durette v. Briggs, 47 Mo. 356; Sears v. Smith, 2 Mich. 243; Yaryan v. Shriner, 26 Ind. 364; Johnson v. Sugg, 21 Miss. 346; Manly v. Slason, 21 Vt. 271; Cannon v. Bonner, 38 Tex. 487; Carnes v. Hubbard, 10 Miss. (2 S. & M.) 108. *Contra*, McClure v. Harris, 12 B. Mon. (Ky.) 261. And so not waived by taking a guaranteed note, Burrus v. Roulhae, 2 Bush (Ky.), 39; Tiernan v. Thurman, 14 B. Mon. (Ky.) 277.

⁶ Hare v. Van Deusen, 32 Barb. (N. Y.) 92. See, however, Bishop v. Snell, 37 Ala. 90.

the lien also, and it is not revived by the failure of the depositary, wrongfully or otherwise, to deliver the deed to the vendor.¹

When the vendor has retained the legal title until part of the payments have been made, or the deed has remained in escrow by agreement until the first instalment has been met, the delivery of the deed in reliance upon the purchaser's notes is a waiver of the lien.²

When the vendor has surrendered an express lien, which was in effect a mortgage, and received part payment, and, for a part, negotiable securities, he is regarded as having waived his lien for this part.³

208. Though the security prove inadequate.—When independent security has been taken, there is an implied waiver of the lien, although the security prove to be inadequate⁴ or wholly void.⁵ The lien once having been waived by the vendor, a court of equity cannot, as a general rule, revive it.⁶

But here the authorities are not in harmony; for where a mortgage had been taken of the land to secure the purchase money, but was void for the reason that the husband had not joined in the execution of it, the lien was sustained;⁷ and where the vendor had been induced by the fraudulent misrepresentations of the vendee to take the security, it was held he might still rely upon the lien;⁸ and so where the mortgage was void for misdescription or ambiguity.⁹

It has been held that the vendor does not waive his security by taking, through the fraud of the purchaser,¹⁰ or without fraud on his part,¹¹ worthless security for the purchase money. But on the other hand it has been held, that the acceptance of a deed of other lands in payment of part of the purchase price is a waiver of the lien, although the title to such other lands proves to be bad.¹²

¹ *Coit v. Fougere*, 36 Barb. (N. Y.) 195.

² *Brown v. Gilman*, 4 Wheat. 256.

³ *Porter v. Dubuque*, 20 Iowa, 440.

⁴ *Hunt v. Waterman*, 12 Cal. 301.

⁵ *Camden v. Vail*, 23 Cal. 633.

⁶ *Mayhem v. Coombs*, 14 Ohio, 428; *Burger v. Potter*, 32 Ill. 66.

⁷ *Haugh v. Blythe*, 20 Ind. 24; *Fowler v. Rust*, 2 A. K. Marsh. (Ky.) 294.

⁸ *Tobey v. McAllister*, 9 Wis. 463; *Coit v. Fougere*, 36 Barb. (N. Y.) 195.

⁹ *Davis v. Cox*, 6 Ind. 481.

¹⁰ *Skinner v. Purnell*, 52 Mo. 96; *Crippen v. Heermance*, 9 Paige (N. Y.), 211; and see *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Burger v. Hughes*, 5 Hun (N. Y.), 180.

¹¹ *Duke v. Balme*, 16 Minn. 306.

¹² *Willard v. Reas*, 26 Wis. 540.

209. Whether taken at the time or subsequently.—The effect of taking security is generally held to be the same, whether taken at the time of the conveyance or subsequently.¹ But the waiver may in either case be avoided by an express agreement that the lien shall remain, notwithstanding the security.² When there is no security, the burden is upon the vendee to show that the lien does not exist; but after the taking of security, aside from the personal obligation of the purchaser, the burden is shifted and is upon the vendor to show that the lien has not been waived.³

There is no waiver, however, until the security is actually taken, although there be an agreement to receive it.⁴

210. The taking of security is only evidence of a waiver, not conclusive of it.—The taking of security for the purchase money has been deemed by some authorities as only presumptive evidence of a waiver of the lien.⁵ Although the security be what is termed by the authorities an independent security,—such as a mortgage on other property, a pledge, or the negotiable note of a third party indorsed by the vendee,—it is only evidence of an intention to waive the lien rights, and not conclusive of such intention.⁶ The taking of security is not a waiver of the lien, unless the nature of the security be such that it evinces an intention to waive it;⁷ and, therefore, a mortgage given expressly in aid of the lien has been held not to be a waiver of it.⁸

¹ But *contra*, held when the security was voluntarily given not in pursuance of the original agreement. *Van Doren v. Todd*, 2 Green (N. J.) Eq. 397.

² *Daughaday v. Paine*, 6 Minn. 443; *Yaryan v. Shriner*, 26 Ind. 364; *Boone v. Murphy*, 6 Blackf. (Ind.) 272.

³ *Bradford v. Marvin*, 2 Fla. 463.

⁴ *Jones v. Vantress*, 23 Ind. 533; *Dunlap v. Burnett*, 13 Miss. 702.

⁵ *Saunders v. Leslie*, 2 Ba. & B. 515; *Cordova v. Hood*, 17 Wall. 1, and cases cited; *Dibblee v. Mitchell*, 15 Ind. 435.

(Chief Justice Gibson, speaking of the circumstances which are held to be a waiver of the lien, says they are so purely arbitrary, that the mind is often puzzled to find the reason of them. "Thus the

assumption, that taking an independent security is inconsistent with an intention to retain the lien, is merely gratuitous; for the parties might, in all reason, just as well be supposed to have intended the security to cumulate." *Kauffelt v. Bower*, 7 S. & R. (Pa.) 64, 77.

⁶ *Lavender v. Abbott*, 30 Ark. 172; and see 2 Story's Eq. Juris. § 1226; *De Forest v. Holum*, 38 Wis. 516; *Sanders v. McAffee*, 41 Ga. 684; *Fonda v. Jones*, 42 Miss. 792.

⁷ *Corlies v. Howland*, 26 N. J. Eq. 311; *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *DuBois v. Hull*, 43 Ib. 26; and see *Christian v. Austin*, 36 Tex. 540.

⁸ *Emison v. Whittlesey*, 55 Mo. 254.

It is said that when it is doubtful whether the security taken should amount to a waiver, the lien should be preserved.¹

The effect of taking independent security may be controlled by express agreement that the lien shall not be waived thereby ; or may be controlled by expressions which negative any intention to abandon it.²

An express agreement that the lien shall be retained, notwithstanding other security be given for the debt, may be made by a married woman, when the land is conveyed to her, and becomes her separate estate.³

211. The vendor may be estopped to claim the lien by reason of having induced another to purchase the property as unincumbered, upon the representation that the lien no longer existed, or would not be claimed.⁴ But his representations will not affect the lien of his vendee, who makes the sale.⁵

3. *Who may enforce the Lien.*

212. Whether the vendor's lien is assignable with the debt which it secures is a question upon which the authorities are not agreed.⁶ Generally in the United States the lien is considered personal to the vendor, and not assignable except under peculiarly equitable circumstances.⁷ Generally, too, where the lien is consid-

¹ *Wilson v. Lyon*, 51 Ill. 166 ; *Harris v. Hanks*, 25 Ark. 510.

² *Austen v. Halsey*, 6 Ves. 475, 483 ; *Elliot v. Edwards*, 3 Bos. & P. 181 ; *Frail v. Ellis*, 16 Beav. 350.

³ *Mears v. Kearney*, 1 Abb. (N. Y.) N. C. 303. The note given for the land was as follows ; "Ninety days after date, I promise to pay to the order of Patrick Kearney one hundred and seventy-five dollars, at the Fifth National Bank, New York, and for the payment of which I pledge my sole and separate estate, being 514 West 43d St., N. Y. Signed, Catherine Kearney. (Indorsed) Patrick Kearney." The inference from the statement and opinion in the case is, that Patrick was her husband ; at any rate he was not the vendor. It is also to be inferred that the premises designated in the note were those for the price of which the note was

taken. The case was before the N. Y. Superior Court.

⁴ *Atkinson v. Lindsey*, 39 Ind. 296 ; *Burns v. Taylor*, 23 Ala. 255 ; *Thompson v. Dawson*, 3 Head (Tenn.), 384 ; *Reily v. Miami Exporting Co.* 5 Ohio, 333.

⁵ *Rowland v. Day*, 17 Ala. 681.

⁶ By the English authorities the lien is held to be assignable by parol. 2 *Dart's V. & P.* (5th ed.) 732, and cases cited.

⁷ Not assignable in the following states :—

ARKANSAS : The lien is an individual equity, and does not pass by an assignment of the debt. *Carlton v. Buckner*, 28 Ark. 66 ; *Hutton v. Moore*, 26 Ark. 396 ; *Williams v. Christian*, 23 Ark. 256 ; *Shall v. Biscoe*, 18 Ark. 162 ; *Jones v. Doss*, 27 Ark. 518.

But this rule does not apply when the debt has been assigned merely as collat-

ered a personal equity it is not assignable even by express language. It is strictly personal to the vendor and can be enforced only by him.¹

In a few states, however, the lien is regarded as assignable, and the assignee of the debt may enforce the lien in his own name.²

eral. *Carlton v. Buckner*, *supra*; *Crowley v. Riggs*, 24 Ark. 563.

CALIFORNIA: *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covilland*, 21 Ib. 178; *Williams v. Young*, 21 Ib. 227; *Ross v. Heintzen*, 36 Cal. 313.

GEORGIA: *Webb v. Robinson*, 14 Geo. 216; *Wellborn v. Williams*, 9 Geo. 86.

ILLINOIS: *Keith v. Horner*, 32 Ill. 524; *Carpenter v. Mitchell*, 54 Ill. 126; *Richards v. Leaming*, 27 Ill. 431; *Moshier v. Meek*, 80 Ill. 79.

MARYLAND: *Dixon v. Dixon*, 1 Md. Ch. Dec. 220; *Inglehart v. Arniger*, 1 Bland Ch. 519.

MISSISSIPPI: The lien subsists only so long as the vendor is himself a creditor. It is a personal equity and does not pass to the assignee of the note or bond. *Pitts v. Parker*, 44 Miss. 247; *Skaggs v. Nelson*, 25 Miss. 89; *Briggs v. Hill*, 6 How. (Miss.) 362; *Walker v. Williams*, 30 Miss. 165; *Stratton v. Gold*, 40 Ib. 778; *Lindsey v. Bates*, 42 Miss. 397; some earlier cases to the contrary.

MISSOURI: *Adams v. Cowherd*, 30 Mo. 458, *dictum*.

NEW YORK: Cannot be enforced by an assignee; *White v. Williams*, 1 Paige (N. Y.), 502; but the vendor may enforce it after an assignment when he continues to have a pecuniary interest in the debt. *Smith v. Smith*, 9 Abb. Pr. N. S. 420.

OHIO: *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, Ib. 437; *Jackman v. Hallock*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ib. 383.

But the lien has been held to pass to a devisee of the notes. *Tiernan v. Beam*, *supra*.

TENNESSEE: *Tharpe v. Dunlap*, 4 Heisk. 674, and cases cited; *Green v. Demoss*, 10 Humph. 371; *contra*, *Norvell v. Johnson*, 5 Ib. 489.

¹ *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431; *Hecht v. Sparks*, 27 Ark. 229; *In re Brooks*, 2 Bank. Reg. 466.

² Assignable in, —

ALABAMA: The transfer of the notes carries the lien, which the assignee may enforce in his own name. *Wells v. Morrow*, 38 Ala. 125; *White v. Stover*, 10 Ala. 441; *Roper v. McCook*, 7 Ala. 318.

INDIANA: *Nichols v. Glover*, 41 Ind. 24; *Kern v. Hazlerigg*, 11 Ind. 443; *Wiseman v. Hutchinson*, 20 Ind. 40; *Fisher v. Johnson*, 5 Ind. 492.

KENTUCKY: *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 Ib. 465; *Eubank v. Poston*, 5 Mon. 286; *Johnson v. Gwathmey*, 4 Litt. 318; *Broadwell v. King*, 3 B. Mon. 449.

TEXAS: *White v. Downs*, 40 Tex. 225; *Cordova v. Hood*, 17 Wall. 1; *Watt v. White*, 33 Tex. 421; *Moore v. Raymond*, 15 Tex. 554.

In the recent case of *Perkins v. Gibson*, 51 Miss. 699, Mr. Justice Tarbell said: —

“The study of the case at bar has induced, in the mind of the writer, these individual impressions for the expression of which he is alone responsible. That the reasons assigned against the transfer or assignment, by contract, of the vendor’s lien by implication, are wholly unsatisfactory to him, and he has met with no convincing argument why this lien should not be as available in the hands of assignees and third persons, as that sub-vendees, with notice, take the land subject thereto. The rule in Kentucky is sustained by the courts of a minority of the states, it is true, but the present impression of the writer is that it is founded in the better reason and equity.” The case was, however, decided upon other grounds.

But the lien does not pass when the note for the purchase price is assigned by one not rightfully holding it.¹ When several notes taken for the purchase money are assigned at different times, each note is *pro tanto* an assignment of the lien,² and an assignment of part of a note gives a *pro tanto* interest in the lien.³

The prevailing doctrine therefore is, that this lien is implied only in favor of the vendor himself: that it is a personal equity. If the note given for the purchase money be transferred, it does not carry with it to the assignee the vendor's lien, so that he can enforce it in his own name.⁴ It cannot be assigned even by express contract.⁵ It can be enforced only by the vendor himself.

It cannot be invoked in favor of one who has advanced money to a purchaser, with which to pay for the lands; or by one of two joint purchasers who has paid the whole consideration.⁶

An assignment of a judgment for the purchase money does not pass the benefit of the lien.⁷

213. Subrogation to the lien.—Where the lien is not assignable, even by express contract, there can of course be no subrogation of another to the position by the vendor, by implication of law; as for instance another person paying the debt due the vendor for purchase money is not subrogated to his lien.⁸ But the rule is otherwise where the lien is held to pass by assignment,⁹ and a purchaser with notice, who pays off a lien, is substituted to the rights of the owner as against another incumbrancer.¹⁰

The lien, being an incident of the debt, cannot be established by the vendor after he has absolutely transferred the debt to another.¹¹

214. When notes are made to a third person at the vendor's request.—But it is held that the lien may exist in favor of a

¹ Deibler v. Barwick, 4 Blackf. (Ind.) 339.

² Davidson v. Allen, 36 Miss. 419; Griggsby v. Hair, 25 Ala. 327.

³ Thomas v. Wyatt, 5 B. Mon. (Ky.) 132.

⁴ Marquat v. Marquat, 7 How. (N. Y.) Pr. 417; (Stansell v. Roberts, 13 Ohio, 148; Skaggs v. Nelson, 25 Miss. 88; Richards v. Leaming, 27 Ill. 431; Wing v. Goodman, 75 Ill. 159.

⁵ Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 Ill. 291.

⁶ Brown v. Budd, 2 Ind. 442.

⁷ Turner v. Homer, 29 Ark. 440.

⁸ Nichol v. Dunn, 25 Ark. 129.

⁹ Peet v. Beers, 4 Ind. 46; Lusk v. Hopper, 3 Bush (Ky.), 179.

¹⁰ Planters' Bank v. Dodson, 17 Miss. (9 S. & M.) 527.

¹¹ Scott v. Mann, 36 Tex. 157.

third person to whom the vendee, at the vendor's request, has agreed to pay a portion of the purchase money.¹ It may exist in favor of one whose land has been sold on execution, and at whose request the sheriff has given credit to the purchaser for so much of his bid as was not required to satisfy the judgment. The transaction may in such case be regarded as in substance to that extent a sale by the owner through the sheriff, and the sheriff's deed to that extent his deed.²

The lien may be established in favor of one who is beneficially the owner of the property sold, although the title stands in another who makes the conveyance to the purchaser.³

In a recent case in Mississippi, it appeared that the owner of land was indebted to another, whom he authorized verbally to sell the land. A sale was made, the owner conveying the land to the purchaser, who gave his note for the amount to the creditor, with the understanding that it was to be a lien upon the land.⁴ Notwithstanding the rule prevalent in this state, that the lien is not assignable by a transfer of the note given for the purchase money, it was held that the land in this case was bound by the lien in favor of the creditor, to whom the note was given.

The decision was based upon a distinction between vendor and grantor; and it was considered that the person to whom the note was given was, under the circumstances, really the vendor.

215. An indorsement of the note "without recourse" does not carry the lien.⁵ And yet a qualification has been made of even this proposition, for it is held that when, after such an assignment, the note is taken up by the vendor and reassigned,

¹ *Francis v. Wells*, 2 Colo. 660; *Mitchell v. Butt*, 45 Ga. 162; *Latham v. Staples*, 46 Ala. 462; *Campbell v. Roach*, 45 Ala. 667.

² *Yarborough v. Wood*, 42 Tex. 91.

³ *Russell v. Watt*, 41 Miss. 602.

⁴ *Perkins v. Gibson*, 51 Miss. 699.

The cases of *Kelly v. Mills*, 41 Miss. 267; *Russell v. Watt*, *ib.* 602, are cited as fully recognizing this distinction. Mr. Justice Tarbell reviews the decisions upon the point whether the lien is affected by the substitution of another person for the ven-

dor in the giving of the notes, approving the decision in *Pinchain v. Collard*, 13 Tex. 333; and he expresses his individual opinion in favor of the broad position that the benefit of the lien should pass by an assignment of the note.

⁵ *Schnebley v. Ragan*, 7 G. & J. (Md.) 120; *Johnson v. Nunnerly*, 30 Ark. 153; *Williams v. Christian*, 23 Ark. 225; *Smith v. Smith*, 9 Abb. (N. Y.) Pr. N. S. 420; *contra*, *Davidson v. Allen*, 36 Miss. 419.

whereby the note and lien are again united in the same party, the lien then attaches.¹

216. Exception when the transfer is made as collateral security.— But as an exception to the rule that the lien is not assignable by a mere transfer of the note, or other obligation given for the purchase money, it is held that when the transfer is for the payment of a debt of the vendor's, or is made as collateral security for his debt, the lien passes with the assignment. The reason is said to be, that when the assignment is made for the benefit of a third person, or he is merely a purchaser of the note, there is no peculiar equity in his favor; but when the transfer is for the security or payment of the vendor's own debt, the equity continues; the assignee, in such case, holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities.²

In like manner it is held that if the vendor indorse the note, and is afterwards obliged to take it up at maturity upon the failure of the vendee to pay, or if the note in any way comes back into the vendor's possession as his own, then both the debt and the lien, which had been separated by the assignment, are again united in the vendor, who may enforce the lien. The lien revives, and as the owner of the note, the vendor may enforce it as though the assignment had never been made.³

217. A mere change in the form of the debt, as for instance the taking of a new note, does not affect the lien.⁴— And it is held by some authorities, that the vendee's giving of his note at the vendor's request to a third person, to whom he was indebted, or to whom he gives the amount, does not affect it; and that it is immaterial to whom the acknowledgment of the debt is made, when this is done at the request of the vendor.⁵

But if the original note be cancelled, and a new one given to

¹ *Bernays v. Feild*, 29 Ark. 218.

² *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Plowman v. Riddle*, 14 Ala. 169; *Hallock v. Smith*, 3 Barb. (N. Y.) 272.

³ *Kelly v. Payne*, 18 Ala. 371; and see, *Turner v. Horner*, 29 Ark. 440; *Bernays v. Feild*, *ib.* 218; *White v. Williams*, 1

Paige (N. Y.), 502; *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *Lindsey v. Bates*, 42 Miss. 397.

⁴ *Cordova v. Hood*, 17 Wall. 1; *Alldridge v. Dunn*, 7 Blackf. (Ind.) 249; *Dibrell v. Smith*, 40 Tex. 447.

⁵ *Hamilton v. Gilbert*, 2 Heisk. (Tenn.) 680; *Nichols v. Glover*, 41 Ind. 24.

another person, the lien is lost;¹ and a verbal agreement by all the parties that the lien should be retained, does not save it. Neither is it lost by obtaining a judgment upon a note.² At most, the obtaining of judgment can only be regarded as a circumstance bearing upon the question whether there was a waiver or not.³

4. *The Remedy.*

218. Cannot be enforced when the debt is barred. — The vendor's lien existing solely in the debt, and being a mere remedy or security for this, cannot be enforced when the debt itself cannot be enforced, and consequently it is barred by the same lapse of time that bars the debt.⁴ Moreover this lien "has no existence until it has been declared to exist by a court of equity;"⁵ and if the debt is gone before the lien is established there can be nothing to establish the lien for. It cannot exist distinct from the debt.⁶

The only remedy for the enforcing the lien is a suit in equity, inasmuch as the lien is altogether a thing of equity and does not exist in law. If a personal obligation has been taken for the debt, an action at law upon this cannot be brought at the same time with a suit in equity to enforce the lien. If the claim be not satisfied by one remedy the other may be resorted to.⁷

219. The remedy at law must first be exhausted, or shown not to exist, before a bill in equity can be filed to enforce the lien. The purchase money is a debt payable out of the purchaser's personal estate, and the equitable lien exists for only so much of the debt as the personal estate is insufficient to answer. "The vendor," says Sugden,⁸ "has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient." If by a proceeding at law he can recover the debt, equity will not interfere to enforce the lien.⁹

¹ *Hurloch v. Smith*, 39 Md. 436; *Phelps v. Canover*, 25 Ill. 314. So held, also, in Texas, when additional security was given. *Jackson v. Hill*, 39 Tex. 493.

² *In re Perdue*, 2 Bank. Reg. 183.

³ *Dubois v. Hull*, 43 Barb. (N. Y.) 26.

⁴ *Trotter v. Erwin*, 27 Miss. 772.

⁵ *Linthicum v. Tapscott*, 28 Ark. 267.

⁶ *Borst v. Corey*, 15 N. Y. 505.

⁷ *Barker v. Smark*, 3 Beav. 64.

⁸ *Vendors & Purchasers*, 394. To same

effect see *Judge Story in Gilman v. Brown*, 1 Mas. 192.

⁹ *Pratt v. Vanwyck*, 6 Gill & J. (Md.) 495; *Richardson v. Stillinger*, 12 Ib. 477; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Ford v. Smith*, 1 McAr. (D. C.) 592; *Eyler v. Crabbs*, 2 Md. 137; *Roper v. McCook*, 7 Ala. 318; *Battorf v. Conner*, 1 Blackf. (Ind.) 287; *Russell v. Todd*, 7 Ib. 239.

In MARYLAND it is now provided by statute that the court of chancery may de-

A different rule prevails in several states where the vendee may enforce his lien in the first instance, without having taken any steps to collect the debt at law.¹

In some states a different doctrine of the nature of the lien prevails under which the lien is enlarged, and made more like that which exists under the civil law. It is declared to arise and exist at the time of the sale, and to result from the sale on credit without other security, regardless of the subsequent inability of the purchaser to pay, or of failure to compel him to do so by suit at law.²

220. Parties to bill to enforce lien. — The vendor's lien upon the death of the vendor follows the debt, and may be enforced by the person entitled to enforce the debt itself.³ A specific bequest of the claim for the purchase money carries the lien with it.⁴ Ordinarily the right to enforce the lien after the death of the vendor belongs to the personal representative.⁵ When lands are sold by an administrator under an order of court, the right to enforce the lien for the purchase money ordinarily belongs to him ;⁶ but when the sale is made for the purpose of division among the heirs, who are the beneficiaries, and the existence of debts or other necessity for an administrator is not shown, the heirs may maintain a bill in their own names to enforce the lien.⁷

The administrator of a deceased vendee having no interest in the land is not a necessary party to a suit to enforce the lien.⁸ His heirs-at-law or devisees are necessary parties.⁹ His widow, having a contingent interest in the surplus, is a proper party.¹⁰ But after a sale of the land by the vendee's administrator in

crec a sale to enforce a vendor's lien upon any estate in lands whether legal or equitable, although the complainant may have a perfect remedy at law for the money for which the lien is claimed. Pub. Gen. Laws, Code, 1860, p. 99.

¹ *High v. Batte*, 10 Yerg. (Tenn.) 186 ; *Pratt v. Clark*, 57 Mo. 189 ; *Richardson v. Baker*, 5 J. J. Marsh. (Ky.) 323 ; *Stewart v. Caldwell*, 54 Mo. 536 ; *Bradley v. Bosley*, 1 Barb. (N. Y.) Ch. 125 ; *Dubois v. Hull*, 43 Barb. (N. Y.) 26 ; *Owen v. Moore*, 14 Ala. 640 ; *Campbell v. Roach*, 45 Ala. 667.

² *White v. Downs*, 40 Tex. 225.

³ 2 Story Eq. Jur. § 1227.

⁴ *Tiernan v. Beam*, 2 Ohio, 383, 386 ; *Lavender v. Abbott*, 30 Ark. 172.

⁵ 2 Story Eq. Jur. § 789.

⁶ *Blanton v. Knight*, 51 Ala. 333.

⁷ *Blanton v. Knight*, *supra*.

⁸ *Edwards v. Edwards*, 5 Heisk. (Tenn.) 123 ; *McKay v. Green*, 3 Johns. (N. Y.) Ch. 56.

⁹ *Jackson v. Hill*, 39 Tex. 493 ; and see *Converse v. Sorley*, 39 Tex. 515.

¹⁰ *Edwards v. Edwards*, *supra* ;

his official capacity, to one who had notice of the lien, who is made a party to the bill, it is not necessary to join the heirs.¹

A mere tenant or agent in possession of the land, but having no interest in it, is not a proper defendant.²

221. The bill and decree. — A bill to enforce a vendor's lien should contain a sufficient description of the land upon which it is sought to enforce it, to enable the court to render an effectual decree of sale.³

When some of the notes secured by it are not due, a sale can be decreed only of so much of the land as will suffice to pay the debt then accrued and the costs of suit, leaving the other notes to stand as a lien upon the remainder of the land.⁴ It is erroneous to decree a sale subject to the lien of the remaining notes.

A vendor having liens upon separate parcels of land sold to the same vendee at different times cannot have a decree for the aggregate amount of the liens, and for the sale of all the land to satisfy it; but the decree must be for the sale of each tract for the amount due upon it specifically. The lien is distinct for each parcel.⁵

222. Marshalling assets. — When land subject to a vendor's lien is subsequently mortgaged to one, who in good faith, and without notice of the lien, pays a valuable consideration for his title, he acquires a priority over the vendor, and is entitled to have his claim satisfied in preference to the claim of the vendor for the unpaid purchase money. But if the mortgagee has also security for his claim upon other real or personal property, he may be compelled in equity to exhaust his remedy upon the security held by him, before resorting to the lands affected by the vendor's lien; and if any part of the personal security be wasted or misapplied through his fault or negligence, he must bear the loss.⁶

As a general rule, upon the decease of the vendee his heir or

¹ *Thornton v. Neal*, 49 Ala. 590.

Burton v. McKinney, 6 Ib. 428. And see

² *Milner v. Ramsey*, 48 Ala. 287; *Reed v. Gregory*, 46 Miss. 740.

Codwise v. Taylor, 4 Sneed (Tenn.), 346.

³ *Long v. Pace*, 42 Ala. 495.

⁵ *Edwards v. Edwards*, 5 Heisk. (Tenn.) 123.

⁴ *Emison v. Risque*, 9 Bush (Ky.), 24;

⁶ *Gordon v. Bell*, 50 Ala. 213.

devisee is entitled to have the unpaid purchase money paid out of the personal property.¹

PART II.

THE VENDEE'S LIEN.

223. Money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice.² "There can be no doubt, I apprehend," says Lord Cranworth,³ "that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if, upon the payment of part of the purchase money, the vendor had executed a mortgage to him of the estate to that extent. It seems to me, that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your lordship's house, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out, which have established that rule in principle if not in terms. But I think it is unimportant to go into that, because it is now established and will

¹ Wright v. Holbrook, 32 N. Y. 587; Lamport v. Beeman, 34 Barb. (N. Y.) 239; Livingston v. Newkirk, 3 Johns. (N. Y.) Ch. 312; Warner v. Van Alstyne, 3 Paige (N. Y.), 513.

² 2 Story Eq. § 1217; Lane v. Ludlow, 6 Paige (N. Y.), 316, n.; Chase v. Peek, 21 N. Y. 585; Wickham v. Robinson, 14 Wis. 494; Cooper v. Merritt, 30 Ark. 686; Stewart v. Wood, 63 Mo. 252; Brown v. East, 5 Mon. (Ky.) 497; Wickman v. Robinson, 14 Wis. 494; Shirley v. Shirley, 7 Blackf. (Ind.) 452.

³ Rose v. Watson, 10 Ho. Lords Cas. 672; and see, also, Wythes v. Lee, 3 Drew. 396; Cator v. Earl of Pembroke, 1 Bro. C. C. 301.

IN CALIFORNIA it is provided that one who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration. Civil Code, 1872. See 3050.

from henceforth be established as a very sound principle, founded on solid justice.”

224. Upon the rescission of a contract of sale, it seems there should be a lien for the purchase money paid upon it in those states where a vendor's implied lien exists.¹ If there has been a sale and conveyance of the land in the first place, there is no reason why the lien should not arise upon a resale and reconveyance of the property.² The lien will then arise from the conveyance in the same manner as it arose upon the first conveyance.

PART III.

THE VENDOR'S LIEN BY CONTRACT OR RESERVATION.

1. *Nature and Extent of such Lien.*

225. Lien by contract not a vendor's lien. — The interest of a vendor who has given an ordinary contract or bond for the sale of land, but retains the title to the land in himself, is often spoken of in the cases as a vendor's lien ;³ but it is conceived that this is a misuse of terms, which should be avoided as leading to confusion. There is a fundamental distinction between a vendor's security in such case, and the lien implied by law, and properly known as a vendor's lien. When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title ; while in case of a mere lien in the vendor, the fee is in the purchaser, who may at any time discharge the lien by conveying the land to a *bonâ fide* purchaser for value.⁴ In the one case the vendor has a lien without any title, and in the other he has the title without any occasion for a lien. His title, by the terms of the contract, is his security ; and he cannot in any way be divested of his title, except the vendee fulfil his contract, and by that means become

¹ See § 191.

² *Scott v. Griggs*, 49 Ala. 185 ; *Napier v. Jones*, 47 Ala. 90. See *Willis v. Searcy*, 49 Ala. 222.

³ See, of recent cases, *Stevens v. Chadwick*, 10 Kans. 406 ; *Smith v. Rowland*, 13 Kans. 245 ; *Neel v. Clay*, 48 Ala. 252 ; *Hill v. Grigsby*, 32 Cal. 55.

⁴ *Church v. Smith*, 39 Wis. 492, 496, per *Lyon, J.* ; *Sparks v. Hess*, 15 Cal. 194, per *Ch. J. Field* ; *Driver v. Hudspeth*, 16 Ala. 348 ; *Wells v. Smith*, 44 Miss. 296 ; *Pitts v. Parker*, 44 Miss. 247 ; *Hutton v. Moore*, 26 Ark. 382 ; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395 ; *Reese v. Burts*, 39 Ga. 565.

entitled to a conveyance. As already noticed, the relation of the vendor and vendee in such case bears a strong similitude to that of mortgagee and mortgagor. The vendor, having the title, has a substantial security; having no title, he has by implication a lien in name, but it exists only in name until a court of equity has given it force by a decree.¹ A lien by contract "has none of the odious characteristics of the vendor's equitable lien."²

It is just as proper to call a mortgage given for purchase money a vendor's lien, as to call by that name the lien of one who has given a contract to sell, but retains the legal title, or who has reserved a lien in his deed of conveyance.

It is often said that a vendor's lien may arise as well before the conveyance as after it.³ But the same courts which give this name to the lien retained by a vendor, who holds the legal title as security for the performance of the contract of sale, generally proceed to point out the differences between this lien and that which is implied upon a conveyance; and inasmuch as the only likeness between the two liens is in their both securing the purchase money, it is proposed in treating of the subject to confine the term "vendor's lien" to that lien which is in equity implied to belong to a vendor for the unpaid purchase price of land sold and conveyed by him.

226. The legal effect of a title bond is sometimes said to be like a deed by the vendor and a mortgage back by the vendee. The vendor holds the legal title, and all persons must necessarily take notice of it, and although the vendee enter into possession,

¹ "It is, in short, a right which has no existence, until it is established by the decree of a court in the particular case." Per Story, J., in *Gilman v. Brown*, 1 Masson, 192. "His lien is an individual equity, of no force until declared by a court of equity." *Hutton v. Moore*, 26 Ark. 382, 396, quoted in *Campbell v. Rankin*, 28 Ark. 401, 406.

² Per Ch. Justice Watkins, in *Moore v. Anders*, 14 Ark. 634.

³ *English v. Russell*, 1 Hempst. 35; *Yancey v. Mauck*, 15 Gratt. (Va.) 300; *Hill v. Grigsby*, 32 Cal. 55; *Amory v. Reilly*, 9 Ind. 490; *Servis v. Beatty*, 32 Miss. 52.

Upon this point Mr. Hilliard, in his *Treatise on Mortgages*, vol. 1, p. 665, very justly remarks: "It is difficult to understand how a party can have a lien upon property, of which he at the same time has the absolute legal ownership; or how the same term can be accurately employed to denote such ownership subject to a mere executory agreement for conveyance, and the very shadowy interest, 'neither property nor a right of action, neither *jus in re* nor *jus ad rem*,' which remains in the vendor after an actual transfer to the vendee."

his deed will of course convey only his equitable title. Like a mortgagor in possession he has an equity of redemption, while the vendor holds the title by reservation rather than by grant, as in the case of an ordinary mortgage. The equitable estate of the vendor may be alienated or devised as real estate, and upon his death it will descend to his heirs; while on the other hand, although the vendor holds the legal title upon his death, the securities he has taken for the purchase money go to his personal representative.¹ Although the vendor's remedy upon the note or contract or bond taken for the purchase money be barred by the statute of limitations, or by the discharge in bankruptcy of the vendee, the lien upon the land is not affected. As in respect to mortgages, the vendor's lien will in such case be presumed to have been satisfied after the lapse of twenty years, and the continued possession of the vendee;² and on the other hand, if the vendor remain in possession, so long as he recognizes the vendee as the equitable owner the statute does not begin to run; and after it does begin to run, the vendee may at any time within the same period redeem the title.³

When after such a contract the vendor, at the request of the vendee, pays for improvements upon the property, which by the terms of the contract the vendee was himself to make before receiving a conveyance, the amount so paid becomes a further lien upon the property, which the vendor may enforce by a sale of the vendee's interest under the contract.⁴

227. The holder of the contract cannot impair the security. The legal title of the vendor in such case is not affected by any liens created by the person who holds the contract of purchase, as for instance a mechanic's lien for labor and materials furnished him;⁵ or a conveyance or mortgage by him;⁶ or a judgment or

¹ *Smith v. Moore*, 26 Ill. 392; *Button v. Schroyer*, 5 Wis. 598; *Lewis v. Hawkins*, 23 Wall. 119; *Holman v. Patterson*, 29 Ark. 357; *Lewis v. Boskins*, 27 Ark. 61; *Scroggins v. Hoadley*, 56 Ga. 165; *Lingan v. Henderson*, 1 Blane (Md.) Ch. 236; *Relfe v. Relfe*, 34 Ala. 504; *Cleveland v. Martin*, 2 Head (Tenn.), 128; *Richards v. Fisher*, 8 W. Va. 55; *Merritt v. Judd*, 14 Cal. 59; *Purdy v. Bul-*

lard, 41 Cal. 444; 2 Story's Eq. § 1212. See *Greene v. Cook*, 29 Ill. 186.

² *Lewis v. Hawkins*, 23 Wall. 119.

³ *Harris v. King*, 16 Ark. 122.

⁴ *Grove v. Miles*, 71 Ill. 376; S. C. 58 Ill. 338.

⁵ *Seitz v. U. P. R. Co.* 16 Kans. 133; *Cochran v. Wimberly*, 44 Miss. 503.

⁶ *Sitz v. Deihl*, 55 Mo. 17; *Harvill v. Lowe*, 47 Ga. 214; *Carter v. Sims*, 2 Heisk. (Tenn.) 166.

attachment against him.¹ Such claims necessarily arise after the lien created by the contract, and must be subject to that lien. The vendee cannot possibly do anything to impair that lien any more than a mortgagor can, after the execution of his mortgage, do anything with his title to impair that security.

After a title bond or a contract of sale has been given for the conveyance of lands upon the payment of the purchase money, the lands are not subject to sale under execution at law, at the suit of one obtaining judgment afterwards against the vendor; the lien of the vendee prevails against the lien of the judgment creditor, which can operate only upon the interest which the vendor had at the time of its rendition.²

228. An express reservation in a deed of a lien upon the land conveyed creates an equitable mortgage, and when the deed is recorded every one is bound to take notice of the incumbrance. Thus, where land was sold, and for the purchase money several promissory notes of the purchaser were taken, and these were described in the deed of conveyance, and expressly made a lien upon the lands conveyed, a purchaser on execution obtained only an equity of redemption subject to such lien.³

To create such a lien there must be something more than a mere recitation that the purchase money, to a certain amount, remains unpaid; this amount must be expressly charged upon the land conveyed.⁴ But a grant of land, "to have and to hold the same under and subject, nevertheless, to the payment" of a certain sum at the decease of the grantee, constitutes a charge upon the land, in whosoever hands it may be.⁵

A stipulation in a deed, that the title shall not vest in the grantee until the purchase money is paid, amounts in equity to a mortgage.⁶ So does a deed providing that it shall be absolute on the payment of certain notes, but in default of payment shall be void.⁷

¹ Hadley v. Nash, 69 N. C. 162; Roberts v. Francis, 2 Heik. (Tenn.) 127; Tuck v. Calvert, 33 Md. 203.

² Shinn v. Taylor, 28 Ark. 523; Money v. Dorsey, 7 S. & M. (Miss.) 22; Taylor v. Eckford, 11 Ib. 21.

³ Davis v. Hamilton, 50 Miss. 213;

Stratton v. Gold, 40 Miss. 781; Caldwell v. Fraim, 32 Tex. 310.

⁴ Heist v. Baker, 49 Pa. St. 9.

⁵ Heist v. Baker, *supra*.

⁶ Pugh v. Holt, 27 Miss. 461.

⁷ Carr v. Holbrook, 1 Mo. 240.

229. A lien reserved is a lien by contract. — A lien for the purchase money expressly reserved by a vendor in his deed of conveyance is a lien created by contract, and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded.¹ It is not waived by the taking of other security, as is the case with an ordinary vendor's lien.² It is governed by the same rules that a mortgage is. It passes by an assignment of the note secured by it.³ It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after a foreclosure sale.⁴

"The reservation of the vendor's lien in the deed of conveyance," says Mr. Justice Bradley, of the Supreme Court of the United States,⁵ "is equal to a mortgage taken for the purchase money contemporaneously with the deed, and nothing more. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money."

The lien differs also from a vendor's lien in that it may secure the performance of any covenant or undertaking agreed upon, instead of a fixed sum payable in money; as for instance it may secure an agreement to pay in specific articles.⁶

230. The vendee's title imperfect until the debt is paid. — When land has been conveyed by a deed, reserving a lien upon it for the purchase money, the lien is an incumbrance upon it, and an execution sale of it as the property of the vendee should be

¹ *White v. Downs*, 40 Texas, 226, per Gray, J. "The vendor's lien, however, properly understood, is not in all respects the same as the express lien often reserved in deeds of conveyance for payment of purchase money, nor as strict mortgages or deeds of trust for it, nor yet as the security held by a vendor who has only given a bond for the title. These are often confounded with the vendor's lien, because security of the purchase money is common to all of them. But the vendor's lien arises wholly from inference or implication, which is invisible, and cannot be recorded; the others are from express con-

tract, visible to all, and may be recorded. All of the same consequences do not, therefore, necessarily result, as to assignees or holders of the debt secured by the vendor's lien, nor as to purchasers of the land liable to it, as between the original parties and privies, as do often occur in the cases of express lien by contract."

² *Carpenter v. Mitchell*, 54 Ill. 126.

³ *Carpenter v. Mitchell*, *supra*; *Markoe v. Andras*, 67 Ill. 34.

⁴ *Markoe v. Andras*, *supra*.

⁵ *King v. Young Men's Ass'n*, 1 Woods, 386.

⁶ *Harvey v. Kelly*, 41 Miss. 490.

made as of incumbered property.¹ It has precedence over a prior judgment against the vendee.²

The vendee's title is imperfect until this debt is paid. Every one taking the title through him must have notice of the lien reserved. This lien is in fact an equitable mortgage. In the case of an implied lien, the courts have generally been unwilling to extend it beyond the security of the vendor, because it might tend to embarrass the vendee's right of disposing of the property by giving countenance to secret liens upon it; but this reason does not apply when the lien is reserved by express contract in the deed.³

The effect of a lien expressly reserved cannot be controlled by evidence of a verbal agreement that there should be no lien.⁴

231. A married woman is bound also by a contract in the nature of a mortgage for purchase money of land conveyed to her, and created by the vendor's reserving in the deed to her a lien upon the land for the security of her note, given for such purchase money.⁵

232. Waiver of the lien. — A lien reserved by contract, or existing in the vendor by reason of his not having parted with the legal title, having given only a bond or contract of sale, is of course not lost or waived as an implied lien is by accepting other security.⁶ Neither does a change of notes, or the substitution of the notes of another person, as for instance those of a subsequent purchaser, affect the lien; ⁷ nor does the taking of new notes by an assignee in his own name, and extending the time of payment.⁸ It is not waived by taking under duress depreciated currency in payment of the debt.⁹

¹ *Thompson v. Heffner*, 11 Bush (Ky.), 353; *Summerville*, 55 Mo. 164; *Adams v. Cowherd*, 30 Mo. 458; *Lewis v. Perry*, 8 Bush (Ky.), 615; *Hurley v. Hollyday*, 35 Md. 469; *Schwarz v. Stein*, 29 Md. 119; *Magruder v. Peter*, 11 G. & J. (Md.) 217; *Hatcher v. Hatcher*, 1 Rand. (Va.) 53; *Knisely v. Williams*, 3 Gratt. (Va.) 265.

² *Parsons v. Hoyt*, 24 Iowa, 154.

³ *Stratton v. Gold*, 40 Miss. 778.

⁴ *Hutchinson v. Patrick*, 22 Tex. 318.

⁵ See *Carpenter v. Mitchell*, 54 Ill. 126.

⁶ *Lusk v. Hopper*, 3 Bush (Ky.), 179; *Fogg v. Rogers*, 2 Coldw. (Tenn.) 290; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *McCaslin v. The State*, 44 Ind. 151; *Bozeman v. Ivey*, 49 Ala. 75; *Strickland v.*

Bozeman v. Ivey, *supra*; *Bradford v. Harper*, 25 Ala. 337.

⁸ *Conner v. Banks*, 18 Ala. 42.

⁹ *Ludington v. Gabbert*, 5 W. Va. 330.

The vendor who has an express lien may by his acts or declarations waive it, as for instance by inducing another to buy the property as unincumbered; or by permitting and encouraging the administrator of the vendee to sell the property to satisfy the lien, and bidding at the sale. Such bidding at the sale could properly be interpreted by the purchaser as a waiver of the lien, and as an acknowledgment that he was looking solely to the proceeds of the sale, and not to the land itself, for the satisfaction of his claim.¹

233. Order of liability of parcels sold. — Purchasers of land, subject to a lien by contract for the payment of purchase money, have the same equities as between themselves as purchasers subject to a formal mortgage. The rule of contribution in the adverse order of sale applies where the same rule applies in the case of mortgages. Simultaneous purchasers should contribute *pro rata*.²

234. When the vendor in possession must account. — When a vendor, after giving a bond or contract of sale, remains in possession, and there is delay in making the conveyance beyond the time set for it, the vendee should be credited with a share of the rents and profits received from the use and enjoyment of the property, proportioned to the amount he may have paid on his purchase.³

2. *Transfer and Enforcement of the Lien.*

235. Assignment of the note or bond passes the security on the land. — An assignee of a note or bond given for purchase money, by one who has taken a contract of sale or who has taken a conveyance in which a lien upon the land is expressly reserved, like the assignee of a note secured by mortgage, is generally held to be entitled to the benefit of the security, and may enforce specific performance of the contract of sale or may enforce the lien reserved.⁴ If a vendor who retains the legal title for his security

The vendor was compelled in this case to receive Confederate treasury notes during the Rebellion.

¹ Butler v. Williams, 5 Heisk. (Tenn.) 241.

² Wilkes v. Smith, 4 Heisk. (Tenn.) 86.

³ Grove v. Miles, 71 Ill. 376.

⁴ Carpenter v. Mitchell, 54 Ill. 126; Stevens v. Chadwick, 10 Kans. 406, and cases cited; McClintic v. Wise, 25 Gratt. (Va.) 448; Kimbrough v. Curtis, 50 Miss. 117; Dollahite v. Orne, 2 Sm. & M.

assigns the notes taken for the purchase money, he then holds the legal title as trustee for the holder of the notes, and he cannot properly do anything to defeat the rights of such holder. If he, regardless of the trust, conveys the land to a stranger, who purchases in good faith, the vendor then becomes a trustee of the purchase money which he has realized, for the benefit of the holder of the notes he assigned.¹

The assignment of a note which upon its face shows that it was given in consideration of the purchase money of land, or expressly reserves a lien upon it, passes the lien to the assignee who may enforce it.²

One who takes title from the vendor, with knowledge of an outstanding note for the purchase money previously assigned by the vendor, takes subject to the lien of such note,³ unless the note was transferred after maturity, or in such manner that it is subject in the hands of the holder to all equities the maker may have against it.⁴

236. Order of payment of several notes.—In case there are several notes or bonds secured in this way, the same equitable rule is applied as to the order of payment of such notes or bonds that is applied when they are secured by a formal mortgage or trust deed; that which was first assigned carries so much of the

(Miss.) 591; *Tanner v. Hicks*, *Ib.* 299; *Roper v. Day*, 48 Ala. 509; *Sheppard v. Thomas*, 26 Ark. 626; *Campbell v. Rankin*, 28 Ark. 401; *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Wells v. Morrow*, 38 Ala. 125; *Kelly v. Payne*, 18 Ala. 371; *Roper v. McCook*, 7 Ala. 318; *Hall v. Click*, 5 Ala. 363; *Moore v. Anders*, 14 Ark. 634; *Shall v. Biscoe*, 18 Ark. 142; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Adams v. Cowherd*, 30 Mo. 658; *Ferry v. George*, 37 Miss. 539; *Robinson v. Harbour*, 42 Miss. 795; *Cleveland v. Martin*, 2 Head (Tenn.), 128.

The cases seem to be uniform upon this point, with the exception of those in Ohio.

By statute in ARKANSAS, 1873, Acts, c. 217, the lien is made assignable by a transfer of the note or other obligation for the debt, provided the lien is expressed upon the face of the deed of conveyance.

In CALIFORNIA it is provided that where a buyer of real property gives to the seller a written contract for the payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien. Civil Code, 1872, § 3047.

¹ *Cummings v. Oglesby*, 50 Miss. 153; *Pitts v. Parker*, 44 Miss. 252; *Parker v. Kelly*, 10 S. & M. (Miss.) 191; *Skaggs v. Nelson*, 25 Miss. 89; *Connor v. Banks*, 18 Ala. 42.

² *Bailey v. Smock*, 61 Mo. 213; *Murray v. Able*, 19 Tex. 213.

³ *Young v. Atkins*, 4 Heisk. (Tenn.) 529.

⁴ *Shinn v. Fredericks*, 56 Ill. 439.

lien as is necessary to pay it, unless there be an express agreement otherwise.¹

Such assignee, moreover, is entitled to all the remedies of the vendor to enforce the lien; and the latter cannot by any act of his deprive the assignee of these remedies.²

237. Statute of limitations. — A lien founded upon contract may be enforced, although the debt be barred by the statute of limitations.³

The relation of a purchaser by title bond to his vendor, is similar to that of mortgagor to mortgagee, and his possession is in like manner consistent with his obligation to pay the money secured, and does not become adverse except under circumstances which would make a mortgagor's possession adverse.⁴

238. No obligation first to exhaust the personal remedy. — When the lien is created by express contract, the rule of equity adopted by some courts as to liens arising by implication of law, that the vendor shall first exhaust his remedy against the personal estate of the vendee, has no application.⁵

239. Proceedings to enforce such lien. — To enforce a lien for the purchase money reserved by the vendor in his deed, the same proceedings are had as in case of a formal mortgage. The same persons must be made parties. If the vendee has sold any part or the whole of his interest, his grantee must be made a party; and so must any one who has acquired a lien upon the property through him.⁶ "The rights of the vendee," says Mr. Justice

¹ *McClintie v. Wise*, 25 Gratt. (Va.) 448.

² *McClintie v. Wise*, *supra*.

³ *Driver v. Hudspeth*, 16 Ala. 348.

⁴ *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570, overruling *Ray v. Goodman*, 1 Sneed (Tenn.), 587.

⁵ *Smith v. Rowland*, 13 Kans. 245; *Sparks v. Hess*, 15 Cal. 186, 193; *McCaslin v. The State*, 44 Ind. 151.

⁶ *King v. Young Men's Ass'n*, 1 Woods, 386; *Gaston v. White*, 46 Mo. 486.

In Iowa it is provided by statute that the vendor of real estate, who has given a

bond or other writing to convey it, and part or all the purchase money remains unpaid after the day fixed for payment, whether the time is or is not the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. The vendee in such cases, for the purpose of the foreclosure, is treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. §§ 3329, 3330, Revision 1873.

Bradley,¹ "being the same as those of a mortgagor, they must be extinguished in the same way. They are vested and well defined in the law. They constitute an estate called, it is true, by the name of an equity of redemption; but still an estate which may be conveyed incumbered, and laid under other liens. And the heirs and assigns of the vendee and subsequent holders of liens on the property against him cannot be discharged or ignored by the original vendor or his assigns, when they desire to extinguish this estate."

240. No tender of performance before action necessary. — It is no defence to an equitable action to enforce a lien under a contract for unpaid purchase money, that the vendor did not tender a deed before bringing suit.² After the time for the performance of the contract has passed, without any offer by either party to perform on that day, there can be no action at law upon it by either, but either may claim a specific performance in equity, making an offer of performance in the bill.³ If an action to foreclose the lien be brought, not by the vendor, but by his personal representatives, they should show that they are able and willing to give a deed, or else make the heir or devisee who holds the legal title in trust for the purchaser a party to the suit, so that he will be bound by it.⁴

¹ *King v. Young Men's Ass'n*, *supra*.

³ *Bruce v. Tilson*, 25 N. Y. 194; *Stevenson v. Maxwell*, 2 N. Y. 409. And see

² *Freeson v. Bissell*, 63 N. Y. 168. See, however, *McCaslin v. The State*, 44 Ind. 151; *McKenzie v. Baldrige*, 49 Ala. 564; *Turner v. Lassiter*, 27 Ark. 662; *Wakefield*

⁴ *Thomson v. Smith*, 63 N. Y. 301.

v. Johnson, 26 Ark. 506.

CHAPTER VII.

ABSOLUTE DEED AND AGREEMENT TO RECONVEY.

PART I.

WHEN THEY CONSTITUTE A MORTGAGE.

241. A defeasance is an essential requisite of a mortgage.¹— It may be in the instrument of conveyance, or in a separate writing, or it may exist in parol merely; but it must, nevertheless, exist in some form. The grantor must have a conditional right to have the property restored to him. There must be a valid and binding agreement of some sort on the part of the grantee to yield up the property received by him, when the conditions upon which the conveyance was made have been performed, else there is lacking an element indispensable to a mortgage. The defeasance must be in favor of the grantor himself, and not in favor of any third person. It does not avail anything that the conveyance contains a condition for a reconveyance, if the reconveyance is to be made to some one other than the grantor; whatever else such an instrument may be, it is not a mortgage.²

In equity the rule is different, and the transaction is a mortgage, although the defeasance be to some one other than the grantor; thus, for instance, it may be in the form of an agreement by one person to purchase property at a foreclosure sale, or other public sale, and to hold it until the purchase money be repaid by the party who receives the agreement.³

¹ Defeasance "is fetched from the French word *defaire*, i. e. to defeat or undo; *infictum reddere quod factum est*." Co. Litt. 237 a.

² *Payne v. Patterson*, 77 Pa. St. 134; *Penn. Co. for Ins. v. Austin*, 42 Pa. St. 257; *Shaw v. Erskine*, 43 Me. 371; *Warren v. Lovis*, 53 Me. 463; *Treat v. Strick-*

land, 23 Me. 234; *Marvin v. Titsworth*, 10 Wis. 320; *Carr v. Rising*, 62 Ill. 19; *Stephenson v. Thompson*, 13 Ill. 186; *Magnusson v. Johnson*, 73 Ill. 156; *Flagg v. Mann*, 14 Pick. (Mass.) 479; *Bickford v. Daniels*, 2 N. H. 71; *Hill v. Grant*, 46 N. Y. 96; *Low v. Henry*, 9 Cal. 538.

³ See §§ 268, 331; *Weed v. Steven-*

At law, to constitute a mortgage the conveyance must be made by the mortgagor, and the defeasance by the mortgagee. A bond, therefore, made by the grantee to his grantor, in consideration of the conveyance, and conditioned to support his grantor for life, and in case of neglect to reconvey the land, does not constitute a mortgage. If the deed be made by the person by whom the conditions are to be performed, and he take back a bond for a reconveyance on the performance of the conditions, the transaction may be a mortgage. But in the above case the deed is *to* the person by whom the conditions are to be performed, and his bond is simply a covenant to reconvey, which may be specifically enforced in equity. There is no conveyance from the supposed mortgagor to the supposed mortgagee. Although such a transaction is not a legal mortgage, the bond may be enforced in equity by a decree for reconveyance.¹

242. The usual proviso in a legal mortgage is, that upon the payment of the debt, or performance of the duty named, "then this deed shall be void." But any equivalent expression may be used.² If it appear from the whole instrument that it was intended to be a security for the payment of a debt or the performance of a duty, it is a mortgage; although there be no express provision that upon the fulfilment of the condition the deed shall be void.³ The substance and not the form of the expression is chiefly to be regarded; and an enlarged and liberal view is taken to ascertain and carry into effect the intention of the parties. If there be in the deed itself, or in any separate deed executed at the same time, and constituting with the conveyance one transaction, a provision that the estate shall be reconveyed upon the payment of the debt, such stipulation constitutes a defeasance as much as if the words, "on condition," or "provided however," were used.⁴

son, *Clarke* (N. Y.) Ch. 166; *Umfreville v. Keeler*, 1 *Thomp. & C.* (N. Y.) 486; *Barton v. May*, 3 *Sandf.* (N. Y.) Ch. 450; *Sahler v. Signer*, 37 *Barb.* (N. Y.) 329; *S. C.* 44 *Ib.* 606; *McBurney v. Wellman*, 42 *Ib.* 390; *Spicer v. Hunter*, 14 *Abb.* (N. Y.) Pr. 4; *Ryan v. Dox*, 34 *N. Y.* 307; *Reigard v. McNeil*, 38 *Ill.* 400, and cases cited.

¹ *Robinson v. Robinson*, 9 *Gray* (Mass.),

447. But see *Chase v. Peck*, 21 *N. Y.* 581, where the grantee in such case pledged the land and the produce of it.

² *Adams v. Stevens*, 49 *Me.* 362.

³ *Steel v. Steel*, 4 *Allen* (Mass.), 417; *Lanfair v. Lanfair*, 18 *Pick.* (Mass.) 299.

⁴ *Taylor v. Weld*, 5 *Mass.* 109; *Scott v. McFarland*, 13 *Mass.* 308; *Austin v. Downer*, 25 *Vt.* 558; *Oldham v. Halley*,

Upon this principle a lease for years, in which the lessor acknowledged the receipt in advance of a sum in full for the rent of the premises during the term, and in which "the lessee covenants, promises, and agrees to reconvey said premises to the lessor, upon the payment of the aforesaid sum and interest thereon," is a mortgage, and the relation of the parties is that of mortgagor and mortgagee.¹ If the lessee receives rents and profits, before the term expires, to the amount of the sum advanced by him, and interest thereon, his estate for years is thereupon defeated, and the lessor is in of his old estate.

The condition of defeasance need not necessarily be inserted in the body of the deed. It has the same effect when added underneath in such a way as to be part of the deed, or when executed separately.² A condition written upon the back of a mortgage and not signed was held to be a part of the deed, which was therefore regarded as a mortgage.³

243. Objections to a separate defeasance. — It is sometimes for the convenience of the parties to make the defeasance by a separate instrument, so that the grantee, in the absence of a record of this instrument, is apparently the absolute owner. This form of mortgage has been used sometimes to the prejudice of the mortgagor, and the courts have at times discouraged the use of it as much as possible. Thus at an early date Lord Chancellor Talbot observed: ⁴ "In the northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage the practice as much as possible." In another case, Lord Chancellor Hardwicke declared it to be an imposition upon the mortgagor not to insert the provision for reconveyance in the deed itself.⁵

2 J. J. Marsh. (Ky.) 113. And see *Ferguson v. Miller*, 4 Cal. 97; *Whitcomb v. Sutherland*, 18 Ill. 578. But the instrument is not a mortgage unless equivalent words are used. *Goddard v. Coe*, 55 Me. 385.

¹ *Nugent v. Riley*, 1 Met. (Mass.) 117.

² *Perkins v. Dibble*, 10 Ohio, 433; *Kent v. Allbritain*, 5 Miss. (4 How.) 317; *Baldwin v. Jenkins*, 23 Miss. 206.

³ *Whitney v. French*, 25 Vt. 663.

⁴ In *Cotterel v. Purchase*, Cas. Temp. Talbot, 61.

⁵ *Baker v. Wind*, 1 Ves. Sen. 160.

244. At law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage.¹

A deed with a bond or agreement to reconvey the estate upon payment of a certain sum of money, or upon the performance of some other condition, has always been held to constitute a legal mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction.² A defeasance made after the record of the deed is sufficient where the deed was made without the knowledge of the grantee, and the obligation to reconvey was made upon his being informed of it.³ When the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mortgage.⁴

The instrument of defeasance must be of as high a nature as the deed itself; and consequently a written agreement to reconvey not

¹ *Dow v. Chamberlin*, 5 McLean, 281; 42 Ill. 453; *Sharkey v. Sharkey*, 47 Mo. Bayley v. Bailey, 5 Gray (Mass.), 505; 543; *Copeland v. Yoakum*, 38 Mo. 349; *Judd v. Flint*, 4 Ib. 557; *Murphy v. Calley*, 1 Allen (Mass.), 107; *Decker v. Leonard*, 6 Lans. (N. Y.) 264; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Peterson v. Clark*, 15 Johns. (N. Y.) 205; *Clark v. Henry*, 2 Cow. (N. Y.) 324; S. C. 7 Johns. Ch. 40; *Brown v. Dean*, 3 Wend. (N. Y.) 208; *Hall v. Van Cleve*, 11 N. Y. Leg. Obs. 281; *Weed v. Stevenson*, *Clarke* (N. Y.) 166; *Friedley v. Hamilton*, 17 S. & R. 70; *Manufacturers', &c. Bank, v. Bank of Pa.* 7 W. & S. (Pa.) 335; *Guthrie v. Kahle*, 46 Pa. St. 331; *Houser v. Lamont*, 55 Pa. St. 311; *Kerr v. Gilmore*, 6 Watts (Pa.), 405; *Colwell v. Woods*, 3 Ib. 188; *Stoeper v. Stoeper*, 9 S. & R. (Pa.) 434; *Johnston v. Gray*, 16 Ib. 361; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Archambau v. Green*, 21 Minn. 520; *Walker v. Tiffin Mining Co.* 2 Colo. T. 89; *Shaw v. Erskine*, 43 Me. 371; *Warren v. Lovis*, 53 Me. 463; *Blaney v. Bearce*, 2 Me. (2 Greenl.) 132; *Mills v. Darling*, 43 Me. 565; *Plato v. Roe*, 14 Wis. 453; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Knowlton v. Walker*, 13 Wis. 264; *Freeman v. Baldwin*, 13 Ala. 246; *Preschbaker v. Feaman*, 32 Ill. 475; *Ewart v. Walling*,

Hill v. Edwards, 11 Minn. 22.
² *Nugent v. Riley*, 1 Met. (Mass.) 117; *Erskine v. Townsend*, 2 Mass. 493; *Taylor v. Weld*, 5 Mass. 109; *Scott v. McFarland*, 13 Mass. 308; *Newhall v. Burt*, 7 Pick. (Mass.) 157; *Stocking v. Fairchild*, 5 Ib. 181; *Eaton v. Whiting*, 3 Ib. 484; *Lanfair v. Lanfair*, 18 Ib. 299.

³ *Harrison v. Phillips Academy*, 12 Mass. 456.

⁴ *Wilson v. Shoenberger*, 31 Pa. St. 295; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131.

under seal, though made at the same time with the deed, does not at law constitute a mortgage.¹ If not under seal, the agreement will constitute a mortgage only in equity.² The defeasance must also be absolute. A contract which gives the grantee the option to reconvey, or pay a sum of money, is not a defeasance, which in connection with the deed will constitute a mortgage. The fee is absolute in the grantee if he so elect.³

245. At law the deed and defeasance must be part of the same transaction, and must take effect at the same time.⁴ A subsequent defeasance cannot be allowed to affect the prior conveyance. The transaction must be a mortgage at its inception, and cannot become so afterwards. The defeasance must be such that it may be considered as if it were annexed to, or inserted in, the same deed, and construed as containing the condition upon the performance of which the estate may be defeated.⁵

If at the time of executing an absolute deed the parties verbally agree that a defeasance shall be executed subsequently, on request, such defeasance when executed will relate back to the deed, and make it a mortgage.⁶

It is not necessary that the deed and bond of defeasance should both bear the same date.⁷ If these have once been given, and a reconveyance made in accordance with the terms of the bond, and subsequently the premises are reconveyed to the obligor, under an agreement that the same bond shall continue in force for another reconveyance, this amounts to a redelivery of the bond, and makes the transaction a mortgage.⁸ Where the defeasance is of a different date from the deed, parol evidence is admissible

¹ *Murphy v. Calley* 1 Allen (Mass.), 107; *Kelleran v. Brown*, 4 Mass. 443; *Flint v. Sheldon*, 13 Mass. 443; *Cutler v. Dickinson*, 8 Pick. (Mass.) 386; *Flagg v. Mann*, 14 Ib. 467; *Scituate v. Hanover*, 16 Ib. 222; *Jewett v. Bailey*, 5 Me. 87; *French v. Sturdivant*, 8 Me. 246; *Warren v. Lovis*, 53 Me. 463. See, however, *Harrison v. Phillips Academy*, 12 Mass. 456; *Runlet v. Otis*, 2 N. H. 167.

² *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Eaton v. Green*, 22 Ib. 526; *Cutler v. Dickinson*, 8 Ib. 386; *Kelleran v. Brown*, 4 Mass. 443.

³ *Fuller v. Pratt*, 10 Me. 197.

⁴ *Bennock v. Whipple*, 12 Me. 346; *McLaughlin v. Shepherd*, 32 Me. 143.

⁵ *Murphy v. Calley*, 1 Allen (Mass.), 107, and cases cited.

⁶ *Loving v. Fogg*, 18 Pick. (Mass.) 540; and see *Scott v. Henry*, 13 Ark. 112; *contra*, *Lund v. Lund*, 1 N. H. 39.

⁷ *Harrison v. Phillips Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. (Mass.) 157.

⁸ *McIntier v. Shaw*, 6 Allen (Mass.), 83. See *Judd v. Flint*, 4 Gray (Mass.), 557.

to prove that they were delivered at the same time, and are part of the same transaction.¹ It is not necessary that the deed and defeasance should in terms refer to each other. Their connection may be established by parol evidence.²

246. To be delivered at same time.—The defeasance must be signed, sealed, and delivered at the same time with the deed to which it refers. Although it is not material that the instruments should bear the same date, it is essential that they be delivered at the same time.³ In equity it is immaterial that the deeds and the agreement to reconvey are executed at different times; and, as will be noticed elsewhere, it is immaterial that there be any bond or agreement to reconvey, parol evidence being sufficient to prove the transaction to be a mortgage.⁴ When made subsequently, it must be based on a sufficient consideration, unless it be professedly executed in explanation of the intention of the parties at the time of the conveyance, and of the true character of the instrument. A mere voluntary agreement to reconvey cannot be enforced.⁵

247. If the agreement to reconvey be delivered as an escrow, to be delivered to the obligee upon the repayment of the money within a certain time, it is not executed and delivered at the same time with the deed, so as to constitute part of the same transaction, and therefore the transaction is not a mortgage.⁶ A conveyance absolute on its face was made to one who advanced money to the grantor, and at the same time executed an agreement to reconvey the land, upon repayment of the money advanced, within thirty days; and both instruments were placed in the hands of a third person, with instructions, that if repayment was not so made to deliver both instruments to the grantee. The

¹ *Brown v. Holyoke*, 53 Me. 9.

² *Preschbaker v. Feaman*, 32 Ill. 475.

³ See § 277; *Kelleran v. Brown*, 4 Mass. 443; *Kelly v. Thompson*, 7 Watts (Pa.), 401; *Haines v. Thomson*, 70 Pa. St. 434.

⁴ See chapter viii.; *Walker v. Tiffin Mining Co.* 2 Col. 89; *Scott v. Henry*, 13 Ark. 112.

⁵ *Vasser v. Vasser*, 23 Miss. 378.

⁶ *Bodwell v. Webster*, 13 Pick. (Mass.)

411. The case of *Carey v. Rawson*, 8 Mass. 159, in apparent conflict with the above, is explained on the ground that the deed in that case was not delivered as an *escrow*, but as a deed taking effect presently, without the performance of the conditions; but in *Bodwell v. Webster*, the bond having been delivered in *escrow*, and the conditions never being performed, it was never delivered to the obligee. See *Exton v. Scott*, 6 Sim. 31.

money not being repaid, both instruments, after the default, were delivered to the grantee, the grantor so directing. It was held that the deed, on its delivery to the grantee, conveyed the land to him absolutely, and was not a mortgage. The maxim, "Once a mortgage, always a mortgage," was declared inapplicable to the case, because the conveyance never was a mortgage. The transaction was to the effect, that if the advance was repaid in thirty days it should be a loan; but if not repaid in that time, it should be the consideration for an absolute conveyance of the land in question.¹

248. Parol evidence to connect the deed and defeasance. Parol evidence is admissible to show that an absolute deed and a separate defeasance are parts of the same transaction, and that together they were intended to constitute a mortgage.² Such proof is introduced not to contradict or vary the writings, but to show that they are really one arrangement, and were agreed upon at the same time.³ Parol evidence is also admissible to show that the defeasance has been lost or destroyed by fraud or mistake.⁴

When the conveyance and the agreement to reconvey on payment of the purchase money are on their face of even date, the transaction is necessarily a mortgage, and parol evidence of a different understanding by the parties will not be received to convert it into a conditional sale.⁵ When the two instruments are of different dates, such evidence is admissible. If the agreement recite that it was delivered on the same day with the agreement, although the dates are different, *primâ facie* the transaction is a mortgage; but evidence is admissible to account for the discrepancy between the dates and the execution of the paper; and such evidence may show that the deed was executed upon a sale, and not as security.⁶ If it be acknowledged or proved that it was

¹ Glendenning v. Johnston, 33 Wis. 347. See Leggett v. Edwards, Hopk. (N. Y.) Ch. 530; Henley v. Hotaling, 41 Cal. 22, 28.

² Gay v. Hamilton, 33 Cal. 686; Preschbaker v. Feaman, 32 Ill. 475; Tillson v. Moulton, 23 Ill. 648; Kelly v. Thompson, 7 Watts (Pa.), 401.

³ Reitenbaugh v. Ludwick, 31 Pa. St. 131, 138; Wilson v. Shoenberger, 1b. 295.

⁴ Marks v. Pell, 1 Johns. (N. Y.) Ch. 594.

⁵ Kerr v. Gilmore, 6 Watts (Pa.), 405; Brown v. Nickle, 6 Pa. St. 390. In the latter case it was remarked that Kerr v. Gilmore "pushed the doctrine to its utmost verge."

⁶ Haines v. Thomson, 70 Pa. St. 434. See Baisch v. Oakeley, 68 Pa. St. 92; Gubbings v. Harper, 7 Phil. (Pa.) 276.

in the beginning a sale, the burden of proof is upon the grantor to establish a change in its character.¹

249. If the defeasance express a condition that is illegal, or contrary to public policy, as where the grantee stipulated that if he should not procure two witnesses to testify to a certain state of facts, the deed should be null and void, the transaction was held not to constitute a mortgage, because the legal estate having once vested in the grantee, it could not be divested by his failure to perform the illegal stipulation, but the deed to him became and remained absolute.²

250. When it is once established that the separate instrument is a defeasance, the conveyance assumes the character of a mortgage with the inseparable incident of redemption, which no agreement of the parties that the estate shall be absolute, if the money be not paid at the day fixed, can waive. The intent of the parties contrary to the rules of law avails nothing. The right of redemption, therefore, cannot be affected by receipts and accounts given by the grantor to the grantee, mentioning the deed as an absolute conveyance.³ In all cases, a condition express or implied that the deed shall be void if payment be made at the day, is in equity regarded as substantially performed by a subsequent payment, and thereupon reconveyance may be enforced.⁴

¹ Haines v. Thomson, *supra*.

² Patterson v. Donner, 48 Cal. 369.

³ Bayley v. Bailey, 5 Gray (Mass.), 505.

⁴ McIntier v. Shaw, 6 Allen (Mass.), 83; Parks v. Hall, 2 Pick. (Mass.) 211; Steel v. Steel, 4 Allen (Mass.), 417; Sweet v. Parker, 7 C. E. Green (N. J.), 453; Judge v. Reese, 9 Ib. 387; De Camp v. Crane, 19 N. J. Eq. 166; Vanderhaise v. Hugues, 2 Beas. (N. J.) Eq. 224, 410; Clark v. Lyon, 46 Ga. 202; Wilson v. Patrick, 34 Iowa, 362; Holliday v. Arthur, 25 Iowa, 19; Richardson v. Barriek, 16 Iowa, 407; Moore v. Wade, 8 Kans. 381; Sweetzer's App. 71 Pa. St. 264; Danzeisen's App. 73 Ib. 65; Harper's App. 64 Ib. 315; Odenbaugh v. Bradford, 67 Pa. St. 96; Halo v. Schick, 57 Pa. St. 320; Baugher v. Merryman, 32 Md. 186;

Anthony v. Anthony, 23 Ark. 480; Hunter v. Hatch, 45 Ill. 178; Ewart v. Walling, 42 Ill. 453; Reigard v. McNeil, 38 Ill. 400; Tillson v. Moulton, 23 Ill. 648; Church v. Cole, 36 Ind. 35; Howe v. Russell, 36 Me. 115; Nichols v. Reynolds, 1 R. I. 30; Vasser v. Vasser, 23 Miss. 378; Wright v. Bates, 13 Vt. 341; Mott v. Harrington, 12 Vt. 199; Davis v. Clay, 2 Mo. 161; Wilson v. Drumrite, 21 Mo. 325; Somersworth v. Roberts, 38 N. H. 22; Phoenix v. Gardner, 13 Minn. 430; Yates v. Yates, 21 Wis. 473; Rogan v. Walker, 1 Wis. 527; Bingham v. Thompson, 4 Nev. 224; Cotterell v. Long, 20 Ohio, 464; Miami, &c. Co. v. U. S. Bank, Wright (Ohio), 249; Bennett v. Union Bank, 5 Humph. (Tenn.) 612; McGan v. Marshall, 7 Ib. 121; Webb v. Patterson, 7 Ib. 431; Hinson v. Partee, 11 Ib. 587.

Neither can the right of redemption be restricted to the mortgagee personally, as such a restriction is inconsistent with the nature of a mortgage and void.¹

A deed absolute in form, with an agreement under seal made by the grantee at the same time, promising to reconvey within a specified time, upon repayment of the sum paid for the deed, with interest, constitutes a mortgage, although it is stipulated, that if the grantor fails to repay the sum within the time specified, the agreement shall be void and the deed absolute, "with no right of redemption." This latter provision is, in fact, regarded as quite decisive of the understanding of the parties that the transaction was a conveyance of the estate, defeasible upon the payment of money.²

251. The mortgagor not allowed to renounce beforehand his privilege of redemption.—Generally, every one may renounce any privilege or surrender any right he has; but an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money. When one borrows money upon the security of his property he is not allowed by any form of words to preclude himself from redeeming.³ He cannot agree that upon default his mortgage shall become an absolute conveyance. A subsequent agreement, that what was originally a mortgage shall be regarded as an absolute conveyance, is open to the same objection, and will not be sustained unless fairly made, and no undue advantage is taken by the creditor.⁴ The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration.⁵ Generally, when the consideration of the conveyance was an existing debt, a provision that if the amount required for a repurchase

¹ *Johnston v. Gray*, 16 S. & R. (Pa.) 361; and see *McClurken v. Thompson*, 69 Pa. St. 305.

² *Murphy v. Calley*, 1 Allen (Mass.), 107, and cases cited.

³ See chapter xxii. on "REDEMPTION;" *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Ran-kin v. Mortimore*, 7 Watts (Pa.), 372; *Cherry v. Bowen*, 4 Sneed (Tenn.), 415; *Pierce v. Robinson*, 13 Cal. 125; *Robinson*

v. Farrelly, 16 Ala. 472; *Clark v. Condit*, 18 N. J. Eq. 358; *Youle v. Richards*, 1 N. J. Eq. (Sax.) 534.

⁴ *Henry v. Davis*, 7 Johns. (N. Y.) Ch. 40; *Wright v. Bates*, 13 Vt. 341; *Mills v. Mills*, 26 Conn. 213.

⁵ *Villa v. Rodriguez*, 12 Wall. 323; *Locke v. Palmer*, 26 Ala. 312; *Brown v. Gaffney*, 28 Ill. 150; *Baughner v. Merryman*, 32 Md. 185.

be not paid at the time specified, the agreement for repurchase shall be null and void, or there shall be no redemption afterwards, is looked upon as a device to deprive the debtor of his right of redemption, and is therefore disregarded.¹

252. Cancellation of defeasance.—A deed of defeasance, made at the same time with an absolute deed, may afterwards, upon sufficient consideration, be cancelled so as to give an absolute title to the mortgagee, if no rights of third parties have intervened; but no agreement can be made at the time of creating the mortgage that will entitle the mortgagee at his election to hold the estate free from condition, and not subject to redemption.² Thus, if it be agreed that the grantee, whenever he shall be compelled to pay certain liabilities against which the deed was given as security, may then take immediate possession of the estates, according to certain estimated values, to such an extent as shall be equal to the debt or liability so paid by him, this stipulation does not change the nature of the transaction, which must still be treated as a mortgage.³

If the original bond of defeasance, which was given at the time of taking the deed, be surrendered and destroyed at the expiration of the time limited therein, and a new bond be given upon a consideration partly new, by which the grantee agrees to reconvey the premises upon the payment, within an additional time, of a larger sum, the grantor thereby surrenders his title as mortgagor, and the grantee becomes the owner in fee of the land.⁴ If the original bond be given up, and a new bond to a third person executed in place of it, the transaction loses its character of a mortgage.

When once the defeasance has been delivered up for a valid consideration to be cancelled, and the original transaction is thus confirmed as a sale, and is treated as such by the grantor or his heirs, it cannot afterwards be treated as a mortgage and foreclosed.⁵

¹ *Enos v. Sutherland*, 11 Mich. 538; *Batty v. Snook*, 5 Mich. 231.

² *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Harrison v. Phillips Academy*, 12 Mass. 456.

³ *Waters v. Randall*, 6 Met. (Mass.) 479.

⁴ *Falis v. Conway Mut. Fire Ins. Co.* 7 Allen (Mass.), 46; *Maxfield v. Patchen*, 29 Ill. 42; *Carpenter v. Carpenter*, 70 Ill. 457; *Rice v. Rice*, 4 Pick. (Mass.) 350, note.

⁵ *Shubert v. Stanley*, 52 Ind. 46.

253. Recording of separate defeasance. — In several states it is provided by statute that a bond of defeasance shall not defeat an absolute estate against any one except the maker, unless recorded. If the bond be not recorded a person having no knowledge of it may of course purchase the property, or attach it as belonging absolutely to the grantee; but if he has actual notice of the bond as constituting a part of the transaction of the conveyance, any right he acquires in the property is subject to the mortgage created by the bond.¹ The recording of the defeasance is not necessary in order to give it full effect as between the parties themselves,² but only as against other persons; and as against them it is not necessary when the conveyance on its face does not purport to be absolute.³

Under such statutes it is held that a separate defeasance not recorded cannot be introduced in evidence to show that an absolute conveyance is a mortgage, for the court cannot assume or know that it ever would be recorded; but it will have that effect if recorded at any time before it is introduced in evidence.⁴ Notice of the existence of a bond of defeasance is not to be inferred from the fact alone that the grantor continues in possession after the deed given by him has been recorded.⁵ To constitute notice of a legal mortgage as distinguished from one that is equitable merely, a purchaser must have reason to believe that the conveyance and bond were executed and delivered so as to form one transaction.⁶

254. Whether the record furnishes notice of the nature of the transaction. — Although the instruments may in fact constitute a mortgage as between the parties, yet, if they do not of themselves show that they are parts of one transaction, but are executed on different days, and each is complete in itself, and independent of the other, the record of them is not notice to a subsequent purchaser that they constitute a mortgage. He is bound

¹ *Newhall v. Pierce*, 5 Pick. (Mass.) 450; *Newhall v. Burt*, 7 Pick. (Mass.) 157; *Purinton v. Pierce*, 38 Me. 447; ³ *Russell v. Waite*, Walk. (Mich.) Ch. 31.

⁴ *Tomlinson v. Insurance Co.* 47 Me. 232; *Smith v. Mut. Fire Ins. Co.* 50 Me. 96; *Manufacturers' & Merchants' Bank v. Bank of Pa.* 7 W. & S. (Pa.) 335.

² *Bayley v. Bailey*, 5 Gray (Mass.), 505; ⁵ *Newhall v. Pierce*, 5 Pick. (Mass.) 450.

⁶ *Newhall v. Burt*, 7 Pick. (Mass.) 157.

only by what appears of record, and he has a right to assume from the record in such case that there was an absolute sale merely, with a subsequent agreement for repurchase.¹ It is usual, however, to make such reference in the bond to the debt secured, or to the deed or conveyance, that it is apparent from the construction of these instruments alone that the transaction was a mortgage, and a purchaser is then bound accordingly.² In 1736, land was conveyed by an absolute deed, and the grantee, in 1742, conveyed the land by a deed in which it was recited that his grantee had purchased the first grantor's right of redemption. This recital, however, was held to be no ground for presuming that the first deed was a mortgage.³

255. Notice by possession. — When the mortgage is effected by an absolute deed accompanied by a separate defeasance, possession and actual occupation by the mortgagor is sufficient to put a purchaser from the grantee upon inquiry, and to charge him with notice of the mortgagor's rights.⁴ Such possession is notice to all the world of any claim which he, who is in possession, has upon the land. It is not to be supposed that any man, who wishes in good faith to purchase the land, will do so without knowing what are the claims of a person who is in open possession. He is chargeable, therefore, with knowledge of such claims.⁵ A conveyance of the premises by the mortgagee to a third person amounts to an assignment of the mortgage only if the grantee has notice in any way of defeasance.⁶

PART II.

WHEN THEY CONSTITUTE A CONDITIONAL SALE.

256. The advantage of considering the transaction a mortgage is not all on the side of the grantor; and as between a mortgage and a conditional sale, the latter may be the more for his benefit. In this way he avoids the continuance, or the incurring, of a debt. If at the close of the time limited for reconveyance he is not in condition to perform the contract, or does not desire to, there is no obligation resting upon him to do so. It is his op-

¹ *Weide v. Gehl*, 21 Minn. 449.

² *Hill v. Edwards*, 11 Minn. 22.

³ *King v. Little*, 1 Cush. (Mass.) 436.

⁴ *Danbenspeck v. Platt*, 22 Cal. 330.

⁵ *Pritchard v. Brown*, 4 N. H. 397.

⁶ *Halsey v. Martin*, 22 Cal. 645.

tion to repurchase or not. But if the transaction be a mortgage in the beginning it is always a mortgage. The grantor is not allowed to speculate upon the chances attending the transaction, and upon finding that the property is not worth the amount of the debt to call a mortgage a conditional sale; or on the other hand, when he finds that the property has increased in value, and that there would be an advantage in redeeming, to call what was actually a conditional sale a mortgage. The character of the transaction is fixed at its inception.

257. Cases involving the distinction between mortgages and conditional sales are usually brought before courts of equity for adjudication. At law, as has already been noticed, an agreement for a reconveyance, to constitute a defeasance and make the transaction a mortgage, must be executed at the same time with the conveyance, and as a part of the same transaction, and must be under seal; while in equity any evidence, whether it be in writing or merely parol, which clearly shows that the conveyance was, in fact, intended only as a security, will make the transaction a mortgage; and if there be a written agreement for reconveyance, it matters not how informal it may be, or when it was executed.¹ It follows, therefore, that a court of equity will often pronounce that to be an equitable mortgage which, at law, would be considered a conditional sale. "A court of law," says Judge Story,² "may be compelled, in many cases, to say that there is no mortgage, when a court of equity would not hesitate a moment in pronouncing that there is an equitable mortgage."

258. Intention the criterion.—Whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case.³ "A glance at the numerous adjudications in controversies of this kind will suffice to show that each case must be decided in view of the peculiar circumstances which belong to it and mark its character, and that the only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding

¹ *Flagg v. Mann*, 2 Sumn. 486; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Pearson v. Seay*, 38 Ala. 643.

² In *Flagg v. Mann*, *supra*.

³ See § 325; *Hughes v. Sheaff*, 19 Iowa, 335; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 354; *Davis v. Stonestreet*, 4 Ind. 101; *Heath v. Williams*, 30 Ind. 495.

facts, as well as the written memorials of the transaction.”¹ The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract.

While in all doubtful cases the law will construe the contract to be a mortgage rather than a conditional sale,² yet, when a conditional sale is clearly established, it will be enforced.³ If the relation of debtor and creditor in any given case existed in the beginning, and the debt still subsists as to the consideration of the conveyance, the transaction will be treated as a mortgage. If, however, the debt was extinguished by a fair agreement, and the grantor has the privilege merely of refunding if he pleases, by a given time, and thereby entitle himself to a reconveyance, the transaction is a conditional sale, and the equity of redemption does not continue.⁴ The grantor who neglects to perform the condition on which the privilege of repurchasing depends will not be relieved.⁵

259. Conway v. Alexander. — This matter was carefully considered by the Supreme Court of the United States in *Conway v. Alexander*.⁶ Land had been conveyed to a third person in trust, to reconvey to the grantor if he should repay the purchase money before a day named, and if not, then to convey to the purchaser. The grantor brought a bill to redeem, whereupon the court held that in the absence of a bond, note, or other evidence of indebtedness, the transaction must be regarded as a conditional sale; and as the complainant had not tendered the money at the time provided, that the bill should be dismissed. Chief Justice Marshall, delivering the opinion of the court, said: “To deny the

¹ *Cornell v. Hall*, 22 Mich. 377, 383, per Graves, J.

² § 279; *King v. Newman*, 2 Munf. (Va.) 40; *Robertson v. Campbell*, 2 Call (Va.), 354; *Sears v. Dixon*, 33 Cal. 326; *Skinner v. Miller*, 5 Litt. (Ky.) 86; *Poin-dexter v. McCannon*, 1 Dev. (N. C.) Eq. 373; *Conway v. Alexander*, 7 Cranch, 218.

³ *Davis v. Thomas*, 1 R. & M. 506; *Goodman v. Grierson*, 2 Ball & Beatt. 278; *Pennington v. Hanby*, 4 Munf. 140;

Bloodgood v. Zeigly, 2 Caines (N. Y.) Cas. 124.

⁴ *Robinson v. Cropsey*, 2 Edw. (N. Y.) Ch. 138; S. C. 6 Paige (N. Y.), 480; *Holmes v. Grant*, 8 Ib. 243; *Brown v. Dewey*, 2 Barb. (N. Y.) 28; S. C. 1 Sandf. (N. Y.) Ch. 56.

⁵ *Hughes v. Sheaff*, 19 Iowa, 335; *Sax-ton v. Hitchcock*, 47 Barb. (N. Y.) 220; *Woodworth v. Morris*, 56 Ib. 97; *Whit-ney v. Townsend*, 2 Lans. (N. Y.) 249.

⁶ 7 Cranch, 218.

power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day ; or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the courts of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale ; and as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

“ In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a preëxisting debt, nor any covenant for repayment. An action at law for the recovery of the money, certainly could not have been sustained ; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.”

260. In order to convert what appears to be a conditional sale into a mortgage, the evidence should be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. It may well be that a person buys lands in satisfaction of a precedent debt, or for a consideration then paid, and at the same time contracts to reconvey the lands upon the payment of a certain sum, and there is no intention on the part of either party that the transaction should be, in effect, a mortgage. The covenant to reconvey is not necessarily either at law or in equity a defeasance. It is one fact which may, in connection with other facts, go to show that the parties really intended the deed to operate as a mortgage; but standing alone it does not produce that result. Something more is necessary; and an indispensable thing is a debt by the grantor to the grantee for which the conveyance is security.¹ "The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage."²

261. A contract of repurchase may upon its face show that the parties really intended an absolute sale, with the privilege to the vendor of repurchasing on the terms named. It will be so interpreted when the provisions of the contract are inconsistent with the idea that a mortgage to secure an indebtedness was intended.³ The agreement upon its face may be either an agreement to reconvey merely, or may amount with the deed to a mortgage,⁴ in which case a resort to evidence outside of these instruments may be necessary to determine the character of the transaction.⁵ An

¹ Henley v. Hotaling, 41 Cal. 22.

² Per Chief Justice Rhodes in Henley v. Hotaling, *supra*.

³ Hanford v. Blessing, 80 Ill. 188.

⁴ Hickox v. Lowe, 10 Cal. 197. In this case a debtor conveyed to his creditor, and took back an agreement to reconvey whenever the grantor should repay the consideration, with a stipulated sum per

month for the use of the money, with a provision that if the net rents per month should exceed that sum, the grantee should apply them to the payment of the consideration.

⁵ Rich v. Doane, 35 Vt. 125; Bishop v. Williams, 18 Ill. 101; Snyder v. Griswold, 37 Ill. 216; Parish v. Gates, 29 Ala. 254; McCarron v. Cassidy, 18 Ark. 34.

express provision that the contract for reconveyance should be regarded only as a contract to reconvey, and not as an acknowledgment that the deed was intended as a mortgage, should be given effect to if consistent with the whole transaction, as declaring the intention of the parties that it should not create a mortgage.¹ If an instrument declares that it is a conditional deed and not a mortgage, and is to be absolute upon the non-payment of a sum mentioned at a time specified, it is to be construed as a conditional deed and not a mortgage.² Sometimes the terms of the agreement for reconveyance may not be conclusive that a sale was intended with the privilege of repurchasing, but may be so inconsistent with any other theory that very little further evidence to the same effect will lead to this determination.³ On the other hand, an absolute deed of land which contains a recital that it was executed to secure the payment of a loan of money, shows upon its face that it is a mortgage.⁴

262. A purchaser is entitled to have his sale enforced.—When there is, in fact, a sale instead of a mortgage, but the grantor subsequently claims the transaction to be a mortgage, the grantee may maintain a bill in equity to have it decreed a sale.⁵ A purchaser is as much entitled to have his rights protected as a mortgagor. A sale in connection with an agreement for repurchase comes very near in form and substance to a mortgage, but the rights of the parties under these instruments are very different.⁶ While a mortgage may be redeemed at any time before the right is cut off by foreclosure, there can be no redemption under a conditional sale after the day appointed. But this is the contract of the parties, and either one of them is entitled to have it enforced according to its terms.⁷

¹ *Ford v. Irwin*, 18 Cal. 117.

² *Burnside v. Terry*, 45 Ga. 621.

³ *Hanford v. Blessing*, 80 Ill. 188.

⁴ *Montgomery v. Chadwick*, 7 Iowa, 114.

⁵ *Rich v. Doane*, 35 Vt. 125.

⁶ *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. (Mass.) 467.

⁷ *Joy v. Birch*, 4 Cl. & F. 57; *Pegg v. Wisden*, 16 Beav. 239; *Barrell v. Sabine*, 1 Vern. 268; *St. John v. Wareham*, cited 3 Swanst. 631; *Eusworth v. Griffiths*, 5 Bro.

P. C. 184; *Perry v. Meddowcroft*, 4 Beav. 197; *Holmes v. Grant*, 8 Paige (N. Y.), 243; *Brown v. Dewey*, 2 Barb. (N. Y.) 28, 172; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Trucks v. Lindsey*, 18 Iowa, 504; *Moss v. Green*, 10 Leigh (Va.), 251; *Ransone v. Frayser*, Ib. 592; *Hanford v. Blessing*, 80 Ill. 188; *Pitts v. Cable*, 44 Ill. 103; *Carr v. Rising*, 62 Ill. 14; *Dwen v. Blake*, 44 Ill. 135; *Shays v. Norton*, 48 Ill. 100; *Cornell v. Hall*, 22 Mich. 377; *People v. Irwin*, 14 Cal. 428; 18 Ib. 117; *Henley v.*

263. The character of the transaction is fixed at the inception of it, and is what the intention of the parties makes it. The form of the transaction, and the circumstances attending it, are the means of finding out the intention. If it was a mortgage in the beginning it remains so; and if it was a conditional sale at the start no lapse of time will make a mortgage of it. The recording of the conveyance as a mortgage, if it was intended as a sale with a right of repurchase at the option of the grantor, does not make it a mortgage. If not a security in the beginning, but an absolute sale or a conditional sale, no subsequent event, short of a new agreement between the parties, can convert it into a mortgage.¹

264. If intended by the parties as a security for money, an absolute conveyance is in equity a mortgage. Different instruments executed at the same time, constituting one transaction, are to be read together, in order to ascertain the intent of the parties. Of course it is entirely competent for persons capable of acting for themselves to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a specified time; and the inquiry in every case therefore is, whether the contract is a security for the repayment of money, or an actual or conditional sale.² "If a deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed, or even contained in a separate instrument, or exist merely in parol, let the consideration for it have been a preëxisting debt or a present advance of money to the grantor, the only inquiry necessary to be made is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties; for if it does, then the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to con-

Hotaling, 41 Cal. 22; Merritt v. Brown, 4 C. E. Green (N. J.), 287; Rich v. Deane, 35 Vt. 125; Haines v. Thomson, 70 Pa. St. 434.

¹ Kearney v. Macomb, 16 N. J. Eq. 189.

² Holton v. Meighen, 15 Minn. 69; Hill

v. Edwards, 11 Minn. 22; Weide v. Gehl, 21 Minn. 449; Hicks v. Hicks, 5 G. & J. (Md.) 75; Cole v. Bolard, 22 Pa. St. 431; Wheeland v. Swartz, 1 Yeates (Pa.), 579; Spence v. Steadman, 49 Ga. 133; Lehigh v. White, 8 Nev. 147.

stitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, then it must be purchase money, and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase, or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property."¹

The rights of the parties to the conveyance must be reciprocal. If the transaction be in the nature of a mortgage, so that the grantor may insist upon a reconveyance, the grantee at the same time may insist upon repayment; but if it be a conditional sale, so that the grantor need not repurchase except at his option, the grantee cannot insist upon repayment.²

An absolute deed was made with an agreement by the grantee executed at the same time, whereby it was stipulated that the grantor might at his election repurchase the lands for a certain sum in three months, and for certain other and greater sums in six and twelve months respectively, provided he would so elect at the expiration of six months from the date of the agreement, which sums were largely in excess of the consideration expressed in the deed, and six per cent. interest thereon. The election to repurchase not having been made within the time stipulated, the purchaser refused to allow a repurchase, and claimed that the sale and deed were absolute; the evidence showing that the transaction was really a loan, it was held that the grantor might redeem upon the payment of the consideration expressed in the deed, with interest.³

265. The existence of a debt is the test. — If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the

¹ Robinson v. Cropsey, 2 Edw. (N. Y.) Ch. 143.

² Williams v. Owen, 10 Sim. 386; Davis v. Thomas, 1 R. & M. 506; Shaw v. Jeffery, 13 Moore P. C. 432; Goodman v.

Grierson, 2 Ball & B. 274; Alderson v. White, 2 De G. & J. 97; Tappley v. Sheather, 8 Jur. N. S. 1163.

³ Klinck v. Price, 4 West Va. 4.

terms of the agreement.¹ A debt either preëxisting or created at the time is an essential requisite of a mortgage. "Where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute deed into a mortgage."² The debt may not be evidenced by any bond or note, or covenant to pay it; so that the facts and circumstances of the transaction must be inquired into in order to ascertain whether the consideration of the deed was really a debt or loan; if not one or the other, the deed can hardly be a mortgage.³

An agreement by the grantee in an absolute conveyance, that if the grantor should, within a certain time, bring him the amount of the consideration of the deed with interest, he would deliver up the deed, but otherwise the grantor should forfeit all claim to such deed, was held not to be a defeasance of a mortgage, as there was no debt secured, but merely a contract to reconvey on certain terms.⁴ But whenever a debt is recognized by the parties or established by evidence, such an agreement serves to make a mortgage of the conveyance; as where a grantee a year after the making of the deed to him gave a bond reciting that there had been a loan, and that the conveyance was made to secure it, the transaction was a mortgage, although the bond contained a condition that if the money was not paid on a day named the obligation should be void.⁵ And so where a grantee executed a bond to the grantor reciting the deed to him and the grantor's indebtedness, and providing that if the debt should be paid on or before a certain day the bond should be void, but that the bond should remain in force if the grantee after payment should neglect or refuse to reconvey the land, the transaction was held to be a mortgage.⁶

¹ See § 325; *Morrison v. Brand*, 5 Daly (N. Y.), 40; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *O'Neill v. Capelle*, 62 Mo. 202; *Hall v. Savill*, 3 Greene (Iowa), 37; *Ruffier v. Womaek*, 30 Tex. 332; *Honore v. Hutchings*, 8 Bush (Ky.), 687; *Slowey v. McMurray*, 27 Mo. 113; *Magnusson v. Johnson*, 73 Ill. 156; *Pitts. v. Cable*, 44 Ill. 103; *French v. Sturdivant*, 8 Me. 246; *West v. Hendrix*, 28 Ala. 226; *Hillhouse v. Dunning*, 7 Conn. 143; *Spence v. Steadman*, 49 Ga. 133; *Murphy v. Purifoy*, 52 Ga. 480; and see *Wells v. Morrow*, 38 Ala. 125, for circum-

stances rendering the transaction a mortgage.

² Per Bronson, J., in *Glover v. Payn*, 19 Wend. (N. Y.), 518.

³ *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Lund v. Lund*, 1 N. H. 39; *Henley v. Hotaling*, 41 Cal. 22; *Galt v. Jackson*, 9 Ga. 151.

⁴ *Reading v. Weston*, 7 Conn. 143; and see *Pearson v. Seay*, 35 Ala. 612.

⁵ *Montgomery v. Chadwick*, 7 Iowa, 114.

⁶ *Van Wagner v. Van Wagner*, 7 N. J. Eq. (3 Halst.) 27.

In a case before the Supreme Court of California,¹ the agreement was, that the grantee should execute a bond to reconvey the premises ; but the grantor did not agree to repurchase, and the bond was delivered as an escrow, and it remained an escrow until after the time therein mentioned for the execution of the deed, and was then cancelled. " If the deed was intended as a mortgage, the mortgagee would have a right of action to foreclose the mortgage ; but if he had brought such an action, the answer that there was no promise, either express or implied, on the part of the alleged mortgagor to repay the purchase money, would have been a complete bar. This case differs from *Sears v. Dixon*,² in the important particular, that in that case the mortgagor covenanted to repay the purchase money at a fixed time, and under the name of rent, to pay interest thereon at a stipulated rate ; and the court also found that the parties intended to execute a mortgage ; but in this case the court found that the parties intended the deed to be in fact, as it was in form, an absolute conveyance."

266. When an absolute conveyance has been made upon an application for a loan, and an agreement is made to reconvey upon payment of the money advanced, as a general rule the transaction is adjudged to constitute a mortgage.³ In such case the purpose of the grantor was in the beginning to borrow money ; and unless a change be shown in his intentions it is presumed that any use he may have made of his real estate, in connection with it, was merely as a pledge to secure a loan.⁴

The parties having originally met upon the footing of borrowing and lending, although a different consideration be recited in the deed, it will be considered a mortgage until it be shown that the parties afterwards bargained for the property independently of the loan.⁵ But an application for a loan may in any case re-

¹ *Henley v. Hotaling*, 41 Cal. 22, 28 ; 33 Pa. St. 158 ; *Holmes v. Grant*, 8 Paige (N. Y.), 243.

² 33 Cal. 326.

³ *Russell v. Southard*, 12 How. 139 ; *Threadgill*, 35 Ala. 334 ; *Davis v. Hemenway*, 27 Vt. 589.

Miller v. Thomas, 14 Ill. 428 ; *Parmelee v. Lawrence*, 44 Ill. 405 ; *Wheeler v. Ruston*, 19 Ind. 334 ; *Cross v. Hepner*, 7 Ind. 359 ; *Crasson v. Swoveland*, 22 Ill. 427 ; *Brown v. Nickle*, 6 Pa. St. 390 ; *Kellum v. Smith*, 5 Morris v. Nixon, 1 How. 118 ; and see, also, *Dwen v. Blake*, 44 Ill. 135 ; *Smith v. Doyle*, 46 Ill. 451 ; *Phillips v. Hulsizer*, 5 C. E. Green (N. J.), 308 ; *Crews*

sult in a sale of land absolutely or conditionally, and because the transaction began with such an application it is not to be concluded that it necessarily ended in a loan. The language of the court, in some cases, would seem to imply that a court of equity would always allow redemption in such case; but although such transactions should be carefully scrutinized, when it appears that the negotiations resulted in a sale absolute or conditional this will be supported.¹

The terms of a contract, to the effect that the grantee would reconvey upon the payment of a certain sum and interest, less the rents he might receive, tend to show that the debt, whether pre-existing or created at the time, was not extinguished, although it be declared in the contract that it is merely an agreement to reconvey, and not an acknowledgment of a mortgage.²

267. An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation, binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, the transaction would be an absolute sale notwithstanding.³ And so if there was, in fact, a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage.⁴ A farmer agreed with another that he might sell his farm and have all he could obtain above \$2,000; and to give effect to this agreement the farmer conveyed to him the land, and took back a reconveyance, on condition that the reconveyance should be void upon payment of \$2,000. The transaction was of course held to be a conditional sale.⁵

v. Threadgill, 35 Ala. 334; *Sweetzer's Appeal*, 71 Pa. St. 264; *Tibbs v. Morris*, 44 Barb. (N. Y.) 139; *Marvin v. Prentice*, 49 How. (N. Y.) Pr. 385; *Fiedler v. Darrin*, 50 N. Y. 441; 59 Barb. 651; *Leahigh v. White*, 8 Nev. 147; *Knowlton v. Walker*, 13 Wis. 264; *Richardson v. Barriek*, 16 Iowa, 407.

¹ *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Holmes v. Fresh*, 9 Mo. 206; *Turner v. Kerr*, 44 Mo. 429; *McDonald v. McLeod*, 1 Ired. (N. C.) Eq. 221.

² *People v. Irwin*, 14 Cal. 428.

³ See § 326; *Turner v. Kerr*, 44 Mo. 429; *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilbac*, 42 Cal. 75; *Baughner v. Merryman*, 32 Md. 185; *Weathersly v. Weathersly*, 40 Miss. 462; *Hoopes v. Bailey*, 28 Miss. 328; *Morrison v. Brand*, 5 Daly (N. Y.), 40.

⁴ *Mason v. Moody*, 26 Miss. 184.

⁵ *Porter v. Nelson*, 4 N. H. 130.

But if the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regards it or not. He cannot at the same time hold the land absolutely, and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or a mortgage, is to be found in the question whether the debt was discharged or not by the conveyance.¹ If in the subsequent transactions of the parties there is no recognition in any way of the relation of debtor and creditor, and the vendee for a considerable period holds possession without paying interest or rent, these facts go to show that there is only an agreement for repurchase and not a mortgage.²

268. When purchase is made by one for the benefit of another. — Where a person wishing to purchase certain property, and not being able to do it otherwise, induced a third person to become the purchaser, and he agreed to convey it to the other if certain payments are made to him within a specified time, in default of payment there was no right of redemption afterwards.³ If the relation of debtor and creditor is not created between the parties, the transaction is not a mortgage but a conditional sale.⁴ This is the test to be applied in every case. It is a question of fact, for the determination of which equity allows a wide range of inquiry into the relations of the parties and the circumstances of the case; and from the facts the law deduces the inference, either that there was a sale absolutely or upon condition, or else that the transaction was a mortgage.⁵

¹ *Sutphen v. Cushman*, 35 Ill. 186.

² *O'Reilly v. O'Donoghue*, Ir. Rep. 10 Eq. 73. The Master of Rolls acted upon this principle in a transaction held to be a sale where the agreement for repurchase was founded upon the following letter: "At any time within the next ten years you come forward and pay me £160, provided you want it for yourself or any of your children. . . . I will hand you possession of the same with pleasure, and become your yearly tenant."

³ See § 331; *Hill v. Grant*, 46 N. Y. 96; *Stephenson v. Thompson*, 13 Ill. 186;

Roberts v. McMahan, 4 Greene (Iowa), 34; *Hull v. McCall*, 13 Iowa, 467.

⁴ *Galt v. Jackson*, 9 Ga. 151; *Chapman v. Ogden*, 30 Ill. 515; *Humphreys v. Snyder*, 1 Morris (Iowa), 263.

⁵ *Rice v. Rice*, 4 Pick. (Mass.) 349; *Henry v. Davis*, 7 Johns. (N. Y.) Ch. 40; *Sweetzer's Appeal*, 71 (Pa.) 264; *Todd v. Campbell*, 32 Pa. St. 250; *Heister v. Maderia*, 3 W. & S. (Pa. St.) 384; *Robinson v. Willoughby*, 65 N. C. 520; *Goulding v. Bunster*, 9 Wis. 513; *Turner v. Kerr*, 44 Mo. 429; *McNees v. Swaney*, 50 Mo. 388.

When a person advances money, and at the same time receives a deed and gives back to the grantor a bond to reconvey, these facts incline to the belief that the transaction is a loan and a security. But the case is different when the obligation to convey is given to a person other than the grantor.¹

269. A continuing debt shows the transaction to be a mortgage. — In determining whether a transaction is a contract for repurchase or a mortgage, the fact that there is no continuing debt is a strong circumstance, where there is any doubt, to show that it is a contract for repurchase. If the proof establishes that the consideration money was a loan, and the party receiving it is personally liable for its repayment, that constitutes it a debt; it does not require a writing to make it such, nor is it extinguished by or merged in a mortgage taken for security.² Unless the relation of debtor and creditor existed between the parties in the beginning in reference to the consideration of the conveyance, and the relation continues so that the grantee would have the right to call upon the grantor to supply any deficiency that might arise in case of a foreclosure and sale of the premises, the agreement to reconvey in connection with the deed constitutes a conditional sale.³

There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money either on account of a preëxisting debt or a present loan.⁴

270. An agreement that the grantee may buy the property absolutely, after a specified time, is regarded as a circumstance

¹ *Carr v. Rising*, 62 Ill. 14. See *Smith v. Sackett*, 15 Ill. 528; *Davis v. Hopkins*, Ib. 519, for cases where a third party furnished the money but was not a party to the transaction. Ch. 138; *Saxton v. Hitchcock*, 47 Barb. (N. Y.) 220; *Slowey v. McMurray*, 27 Mo. 113; *Hoopes v. Bailey*, 28 Miss. 328; *Johnson v. Clark*, 5 Ark. 321; *Blakemore v. Byrnside*, 7 Ark. 509.

² *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Porter v. Clements*, 3 Ark. 364; *Farmer v. Grose*, 42 Cal. 169. ⁴ *Henley v. Hotaling*, 41 Cal. 22, 28, per *Rhodes, C. J.*; and see *Usher v. Livermore*, 2 Iowa, 117. Also, see § 272.

³ *Robinson v. Cropsey*, 2 Edw. (N. Y.)

tending to show that the transaction is a conditional sale. Thus where the grantee's covenant, executed at the same time with an absolute conveyance to him, recited that this was made for the purpose of paying a certain sum of money, and stipulated that he would not convey the premises within one year without the consent of the grantor, and, if the grantor within that time should find a purchaser, the grantee would convey the land on receiving the amount with interest for which the land had been conveyed to him; and that in case such sale should not be made within the year, it should then be submitted to certain persons named, to determine what additional sum the grantee should pay for the land, which sum he covenanted to pay, the transaction was held not to be a mortgage, but a conditional sale giving the grantee the right to recover possession of the land, after the expiration of the year, in ejectment against the grantor.¹

271. On the other hand, an agreement that the grantee may sell all the property for the best possible price, and retain from the proceeds the amount due him, paying the residue to the grantor, shows that the transaction is a mortgage² until the power of sale is executed.³ In case the land should sell for a less sum than the debt, the grantee is entitled to recover the deficiency.⁴ And so a conveyance to a trustee with power to sell the land, pay the creditor from the proceeds, and deliver the balance to the grantor on his failure to pay the debt, is a mortgage, and subject to the provisions of a registry law relating to mortgages.⁵ But a stipulation that if the grantor can, within a limited time, "dispose of the land conveyed to better advantage," he may do so, paying to the grantee the "consideration money" mentioned in the deed, does not make the instrument a mortgage.⁶ And so a covenant by the grantor, who is a joint tenant, not to make partition without the

¹ *Baker v. Thrasher*, 4 Den. (N. Y.) 493.

³ *Eaton v. Whiting*, 3 Pick. (Mass.) 484.

² *Ogden v. Grant*, 6 Dana (Ky.), 473; *Crane v. Buchanan*, 29 Ind. 570; *Ruffners v. Putney*, 12 Gratt. (Va.) 541; *Hagthorp v. Hook*, 1 G. & J. (Md.) 270; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470; *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 200; *Kidd v. Teeple*, 22 Cal. 255.

⁴ *Palmer v. Gurnsey*, 7 Wend. (N. Y.) 248.

⁵ *Woodruff v. Robb*, 19 Ohio, 212, and see *Irwin v. Longworth*, 20 Ohio, 581; *Walsh v. Brennan*, 52 Ill. 193. See, however, *Alleghany R. & Coal Co. v. Casey*, 79 Pa. St. 84.

⁶ *Stratton v. Sabin*, 9 Ohio, 28.

advice and consent of the grantee, does not turn a conditional sale into a mortgage.¹

272. The fact that there is no agreement for the payment of the debt is a circumstance entitled to considerable weight, as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist.² "The want of a covenant to repay the money," says Chief Justice Marshall,³ "is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt, or the performance of a duty either existing or created at the time, or else to be created or to arise in the future. But it is not necessary that the debt or duty should be evidenced by any express covenant, or by any separate written security.⁴ Although a mortgage cannot be a mortgage on one side only, but must be a mortgage with both parties,⁵ yet this principle is applicable to the lien upon the land only, and not to the personal obligation.

The fact that there is no collateral undertaking by the grantor for the payment of money, or the performance of any obligation, is by no means conclusive of the nature of the transaction. This is only one circumstance to be regarded in ascertaining whether it is to be treated as a mortgage or a sale with a contract for repurchase.⁶ It affects the equitable rights and claims of the parties. If there be no contract for the repayment of the money, the grantee must bear any loss arising from depreciation in value; and it would seem equitable, on the other hand, that he should have the benefit of any advance in the value of the property, if the repurchase be not made within the stipulated period.

A debtor conveyed to his sureties certain land, taking from

¹ *Cottrell v. Purchase*, For. 61; *Cas. Temp. Talb.* 61.

² *Horn v. Keteltas*, 46 N. Y. 605; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Bacon v. Brown*, 19 Conn. 34; *Jarvis v. Woodruff*, 22 Conn. 550.

³ In *Conway v. Alexander*, 7 Cranch, 218.

⁴ *Brant v. Robertson*, 16 Mo. 129.

⁵ *Copleston v. Boxwill*, 1 Ch. Ca. 1; *White v. Ewer*, 2 Vent. 340.

⁶ *Murphy v. Calley*, 1 Allen (Mass.), 107; *Flagg v. Mann*, 14 Pick. (Mass.) 467-479; *Rice v. Rice*, 4 Ib. 349; *Brant v. Robertson*, 16 Mo. 129; *Bodwell v. Webster*, 13 Pick. (Mass.), 411, 415; *Flint v. Sheldon*, 13 Mass. 443, 448; *Kelly v. Beers*, 12 Mass. 387; *Brown v. Dewey*, 1 Sandf. (N. Y.) Ch. 56; 2 Barb. (N. Y.) 28.

them a bond providing that the obligors should pay his debt, and stating that "the intent of the deed was to indemnify and save them harmless." The bond also referred to the deed as "indemnity and security in addition to security" of other lands mortgaged to the obligors, and stipulated that the land should not be sold for three years, so that the debtor "may redeem if he chooses to do so." If the obligors were not "reimbursed" within the three years, they were to hold the lands free from all claim on the debtor's part, but they agreed to place no obstacles in the way of his "paying said debts and redeeming the said lands." The transaction was adjudged to be a mortgage, and not a conditional sale, although there was no covenant on the part of the grantor to pay the debt.¹

273. The fact that interest is payable, by the terms of the contract, upon the money advanced by the person who takes the title to the property, is a circumstance tending to show that the transaction was a loan upon security instead of a conditional sale. Anything tending to show that there was a subsisting debt, or an advance by way of loan, goes to prove the transaction to be a mortgage.²

What is in fact a payment of interest is sometimes disguised under the payment of rent by the grantor in possession to the grantee; but although the transaction has the appearance of a conditional sale, the payment of rent in lieu of interest may be a circumstance tending to show that it is in fact a mortgage.³ If

¹ *Wing v. Cooper*, 37 Vt. 169.

² *Murphy v. Calley*, 1 Allen (Mass.), 107; *Farmer v. Grose*, 42 Cal. 169; *Harrison v. Houghton*, 41 Ill. 522; *Honore v. Hutchings*, 8 Bush (Ky.), 687.

"Hutchings and Honore, in 1861, jointly purchased thirty acres of land near Chicago, Ill. Hutchings advanced the entire purchase price, took a conveyance to himself, and executed a writing in which, among other things, 'it is agreed between said parties, that when said land is sold said Hutchings is to have first his six thousand dollars so advanced, and ten per cent. interest, and the profits over and above said sum are to be equally divided between said parties. . . . This arrange-

ment is to continue eighteen months, when, if the property has not been sold, said Honore is to pay one half the sum so advanced, with the accrued interest, or said Hutchings is to be the sole owner of the same.' The land was not sold within the time specified, and Honore failed to pay any part of the sum advanced. In 1869, Hutchings sold the land for \$100,000, and refused to pay any part of the profits to Honore. But it was decided that Hutchings held the legal title to one half the land in trust for Honore, and must account for the proceeds according to the agreement."

³ *Wright v. Bates*, 13 Vt. 341; *Woodward v. Pickett*, 8 Gray (Mass.), 617;

a conveyance of land be made in fee, and the grantee give back a bond to reconvey upon repayment of the consideration money, and to permit the grantor to occupy the premises at a rent equal to the interest on the consideration, these are parts of one and the same transaction, and constitute a mortgage.¹

The owner of land occupied by him as a homestead executed an absolute conveyance of it in consideration of one thousand dollars, and the grantee at the same time executed with him a joint instrument stipulating that the grantor should have the privilege of repurchasing the premises for the same price, at any time within twelve months, and should remain in possession, and pay rent at the rate of forty dollars per month until such repurchase, or the expiration of the twelve months. He remained in possession eleven years, and paid over twelve hundred dollars as rents. The transaction was held to be a mortgage; that the rent was a devise to screen usury, and that the debt had been extinguished by the payments made.²

274. The continued possession of the grantor, as is elsewhere noticed with reference to proving by parol that an absolute conveyance is not a sale, is a circumstance tending to show that the agreement for repurchase, in connection with the deed, constitutes a mortgage rather than a conditional sale.³

275. Inadequacy of price. — Among the circumstances which are considered as of weight, as tending to show that an absolute conveyance accompanied by an agreement to reconvey is a mortgage rather than a conditional sale, is a great inadequacy in the price for which the conveyance was made. This alone will not authorize a court to give the grantor a right to redeem; but in connection with other evidence affords much ground of inference that the transaction was not really what it purports to be.⁴ In-

Preschbaker v. Feaman, 32 Ill. 475; *Ewart v. Walling*, 42 Ill. 453.

¹ *Woodward v. Pickett*, 8 Gray, 617.

² In *Boatright v. Peck*, 33 Tex. 68.

³ See § 329, the cases being equally applicable here. *Ransone v. Frayser*, 10 Leigh (Va.), 592; *Gibson v. Eller*, 13 Ind. 124.

⁴ See § 329; *Thornborough v. Baker*, 3 Sw. 631; *Davis v. Thomas*, 1 R. & M. 506; *Williams v. Owen*, 5 M. & C. 303; *Douglass v. Culverwell*, 3 Gif. 251; *Langton v. Horton*, 5 Beav. 9; *Russell v. Southard*, 12 How. 139; *Campbell v. Dearborn*, 109 Mass. 130, 144; *Freeman v. Wilson*, 51 Miss. 329; *Davis v. Stone-*

adequacy of price, to be of controlling effect, must be gross.¹ If it be very inadequate, it is a circumstance tending to show a loan and mortgage; but it is not conclusive. Nor would the fact of the adequacy of the price, taken in connection with the absence of any obligation to repay the money, be conclusive that a conditional sale was intended.² On the other hand, the fact that the consideration is fully equal to the value of the land is evidence of some weight that the transaction was a sale and not a mortgage, because men in making a loan do not usually advance the full amount of the land.³

If the transaction creates no debt or loan, but only a right to repurchase, it is immaterial whether the consideration for the reconveyance is fixed at the same price paid for the conveyance, or at an advanced price.⁴

276. Not material that the instruments are recorded as a mortgage.—When the transaction is otherwise a conditional conveyance and not a mortgage, the latter character is not imparted to it by the mere fact that the instruments are recorded as a mortgage.⁵ The acts or declarations of one party in reference to the transaction afterwards will not change its character. The transaction remains what the parties made it in the beginning, until by mutual agreement they change it. It can hardly be said that the treatment of an absolute deed as conditional by the grantee can make it a mortgage. If it was a mortgage in the beginning, his admission of the fact only relieves the mortgagor from proving it. If it was not a mortgage in the beginning, his treating it as such has no effect unless the mortgagor concurs in

street, 4 Ind. 101; *Pearson v. Seay*, 35 Ala. 612; *Steel v. Black*, 3 Jones (N. C.) Eq. 427; *Streator v. Jones*, 3 Hawks (N. C.), 423; *Stellers v. Staleup*, 7 Ired. (N. C.) Eq. 13; *Kemp v. Earp*, *Ib.* 167; *Wharf v. Howell*, 5 Binn. (Pa.) 499. In this case a lot worth \$800 was conveyed in consideration of \$200, with an agreement to reconvey upon the payment of this sum within three months. *Thompson v. Banks*, 2 Md. Ch. 430; *Crews v. Threadgill*, 35 Ala. 334; *Brown v. Dewey*, 2 Barb. N. Y. 28.

¹ *Elliott v. Maxwell*, 7 Ired. (N. C.) Eq. 246.

² *Brown v. Dewey*, 2 Barb. 28; S. C. 1 Sand. Ch. 56.

³ *Carr v. Rising*, 62 Ill. 14, 19, per Walker, J.

⁴ *Glover v. Payn*, 19 Wend. (N. Y.) 518; *West v. Hendrix*, 28 Ala. 226; *French v. Sturdivant*, 8 Me. 246; *Pitts v. Cable*, 44 Ill. 103.

⁵ *Morrison v. Brand*, 5 Daly (N. Y.), 40; *Jackson v. Richards*, 6 Cow. (N. Y.) 617, 619.

so treating it, so that, in fact, by mutual agreement, the character of the instrument is changed.¹

277. That a conditional sale and not a mortgage was intended may in equity be shown by parol evidence. — For this purpose evidence of the repeated assertions of the grantee that he had bought the property and owned it, of his repeated denials that the grantor had any interest in it, and of acts of ownership inconsistent with the position of a mere mortgagee, may be received.² But if the instrument on its face be a mortgage, or if a deed and bond of defeasance be executed together as part of the same transaction, and therefore constitute a mortgage, parol evidence is not admissible to show that the parties intended that the transaction should operate as a conditional sale. No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage.³ In the one the proof raises an equity consistent with the writing, and in the other the proof would contradict the writing.⁴

And on the other hand, parol evidence is admissible to show that a formal conveyance, with a defeasance executed same time, or afterwards, constituted in fact a mortgage, and not a conditional sale.⁵

But although a formal conveyance can be shown to be a mortgage by extrinsic evidence, a formal mortgage cannot be shown to be a conditional sale.⁶ The reason of the rule, that a formal conveyance may be shown by parol to be a mortgage, while a formal mortgage cannot be shown to be a conditional, by the same means, is, that "in the one case such proof raises an equity consistent with the writing, while in the other it would contradict the writ-

¹ See on this point, but not wholly agreeing with the statement in the text, *Holmes v. Fresh*, 9 Mo. 201; *Thomaston v. Stimpson*, 8 Shep. (Me.) 195; *Nichols v. Reynolds*, 1 R. I. 30.

² See § 246; *Newcomb v. Bonham*, 1 Vern. 8, 214, 232; *Langton v. Horton*, 5 Beav. 9; *Hanford v. Blessing*, 80 Ill. 188.

³ *Wing v. Cooper*, 37 Vt. 169; *Woods v. Wallace*, 22 Pa. St. 171; *Colwell v. Woods*, 3 Watts (Pa.), 188; *Kunkle v. Wolfersberger*, 6 Ib. 126; *Reitenbaugh v.*

Ludwick, 31 Pa. St. 131, 138; *Brown v. Nickle*, 6 Barr (Pa.), 391.

⁴ *Kunkle v. Wolfersberger*, 6 Watts (Pa.), 126.

⁵ *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Farmer v. Grose*, 42 Cal. 169; and see *Gay v. Hamilton*, 33 Cal. 686; *Tillson v. Moulton*, 23 Ill. 648; *Heath v. Williams*, 30 Ind. 495.

⁶ *McClintock v. McClintock*, 3 Brews. (Pa.) 76; *Wharf v. Howell*, 5 Binn. (Pa.) 499; *Reitenbaugh v. Ludwick*, 31 Pa. St. 138.

ing.”¹ When the transaction is a sale, with a right of repurchase, and the grantor claims it to be a mortgage, a bill will lie to have the sale established.²

Such evidence is inadmissible at law.³ It is received only in equity, and when there exist equitable grounds for its admission. It is held, too, that the rule admitting parol evidence in equity for the purposes mentioned does not extend to an official conveyance, such as the deed of a sheriff selling under process.⁴ Such officer has no power to make any sale other than an absolute one.

278. Slight circumstances may determine. — In any case where a party claims to have purchased securities at very much less than their real value, if the evidence be not clear whether the transaction was a sale of the securities or only a mortgage of them, very slight circumstances showing that the transfer was not understood at the time to be absolute, but was made to secure the repayment of the sum advanced, may be sufficient to turn the scale.⁵ And so where there is an agreement to reconvey, very slight circumstances will suffice, in relation to such transactions, to determine their character — whether mortgages or absolute conveyances, with a stipulation securing the grantor a reconveyance upon certain terms and within a certain time.⁶ Thus the circumstance that the reconveyance is to be made upon payment of the precise amount of the consideration, with interest, is taken into consideration as favoring the conclusion that a loan was made.⁷

279. When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage,⁸ although it is in some of the cases said that the transaction

¹ Per Gibson, C. J., in *Kunkle v. Wolfersberger*, 6 Watts (Pa.), 126; *Woods v. Wallace*, 22 Pa. St. 171.

² *Rich v. Doane*, 35 Vt. 124.

³ *Webb v. Rice*, 6 Hill (N. Y.), 219; *Bragg v. Massie*, 38 Ala. 89; *McClane v. White*, 5 Minn. 178; *Belote v. Morrison*, 8 Minn. 87; *contra*, *Tillson v. Moulton*, 23 Ill. 648.

⁴ *Ryan v. Dox*, 25 Barb. (N. Y.) 440.

⁵ *McKinney v. Miller*, 19 Mich. 142, 148.

⁶ *Waite v. Dimick*, 10 Allen (Mass.), 364.

⁷ *Hickox v. Lowe*, 10 Cal. 197. See § 275.

⁸ See §§ 335, 336; *Russell v. Southard*, 12 How. 139; *O'Neill v. Capelle*, 62 Mo. 202; *Brant v. Robertson*, 16 Mo. 469; *Turner v. Kerr*, 44 Mo. 429; *Desloge v. Ranger*, 7 Mo. 327; *Heath v. Williams*, 30 Ind. 495; *Bacon v. Brown*, 19 Conn. 34; *Trucks v. Lindsey*, 18 Iowa, 504; *Baughier v. Merryman*, 32 Md. 185.

appearing upon its face to be a conditional sale will be held to be such when no circumstances appear showing an intention that it should be considered a mortgage.¹ But generally courts of equity incline against conditional sales, and give the benefit of any doubt arising upon the evidence in favor of the grantor's right to redeem.²

"It is unquestionably true, that in cases where upon all the circumstances the mind is uncertain whether a security or a sale was intended, the courts, when compelled to decide between them, will be somewhat guided by prudential considerations, and will consequently lean to the conclusion that a security was meant, as more likely than a sale to subserve the ends of abstract justice and avert injurious consequences. And where the idea that a security was intended is conveyed with reasonable distinctness by the writings, and no evil practice or mistake appears, the court will incline to regard the transactions as a security rather than a sale, because in such a case the general reasons which favor written evidence concur with the reason just suggested." ³

280. The same considerations apply to an assignment of a mortgage, accompanied by an agreement to reassign within a time mentioned. In *Henry v. Davis*,⁴ the Chancellor said: "It is clearly established by the answer and proofs that the bond and mortgage were assigned by the plaintiff to the defendant by way

¹ *Swetland v. Swetland*, 3 Mich. 482; *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138.

² *Fee v. Cobine*, 11 Ir. Eq. Rep. 406; *Trucks v. Lindsey*, 18 Iowa, 504; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Robinson v. Cropsey*, 6 Paige (N. Y.), 480; *Turnipseed v. Cunningham*, 16 Ala. 501; *McNeill v. Norsworthy*, 39 Ala. 156; *Locke v. Palmer*, 26 Ala. 312; *Hickox v. Lowe*, 10 Cal. 197; *McKinney v. Miller*, 19 Mich. 142; *Cornell v. Hall*, 22 Mich. 377; *Poindexter v. McCannon*, 1 Dev. Eq. (N. C.) 373; *Dougherty v. McColgan*, 6 G. & J. (Md.) 275; *Artz v. Grove*, 21 Md. 456; *Baughner v. Merryman*, 32 Md. 185; *Freeman v. Wilson*, 51 Miss. 329; *Scott v. Henry*, 13 Ark. 112; *Heath v. Williams*, 30 Ind. 496; *Bishop v. Williams*,

15 Ill. 553; 18 Ib. 101; *Miller v. Thomas*, 14 Ill. 428; *Pensoneau v. Pulliam*, 47 Ill. 58; *Turnipseed v. Cunningham*, 16 Ala. 501; *Holton v. Meighen*, 15 Minn. 69. "A resort, however, to a formal conditional sale, as a device to defeat the equity of redemption, will, of course, when shown, be unavailing for that purpose. And the possibility of such resort, together with other considerations, has driven courts of equity to adopt as a rule, that, when it is doubtful whether the transaction is a conditional sale or a mortgage, it will be held to be the latter." *Trucks v. Lindsey*, 18 Iowa, 504, per Cole, J.

³ *Cornell v. Hall*, 22 Mich. 383, per Graves, J.

⁴ 7 Johns. (N. Y.) Ch. 40.

of mortgage, to secure the payment of \$225 by a given day; and any agreement that the assignment was to be an absolute sale, without redemption upon default of payment on the day, was unconscientious, oppressive, illegal, and void. The equity of redemption still existed in the plaintiff, notwithstanding any such agreement." The same considerations apply also to an assignment of a lease made in connection with an agreement to reassign, and to the determination of the question whether they constitute a mortgage or a conditional sale of the leasehold estate.¹ But an absolute lease is not deemed a mortgage, because the rent is to go in satisfaction of a debt.²

281. When a mortgage rather than a trust.—A debtor conveyed all his real estate to one of his creditors by an absolute deed, the creditor making a declaration of trust that he would sell the property, pay the debt due himself, and sums to be advanced by him for the payment of other debts of the grantor, and after retaining a certain sum for commissions would reconvey what might remain of the property to the grantor. The transaction was adjudged to be a mortgage, and not an assignment for the benefit of creditors, and that no one but the grantor could call upon the grantee to account.³ The equity of redemption was still subject to attachment by the creditors of the grantor.

But a conveyance expressly in trust to pay debts, and after the debts are paid in trust for one of the grantors, was held not to be a mortgage;⁴ and, therefore, the creditors could not maintain a suit for foreclosure or sale. In such a conveyance a covenant on the part of the debtor to pay the debts would, doubtless, make a mortgage of it.⁵

¹ *Polhemus v. Trainer*, 30 Cal. 685; *win*, 5 Ves. 834; *Bell v. Carter*, 17 Beav. 11; *Jenkin v. Row*, 5 De G. & S. 107.
² *Goodman v. Grierson*, 2 Ba. & Be. 278.

³ *Halo v. Schick*, 57 Pa. St. 319. ⁴ *M'Menomy v. Murray*, 3 Johns. (N. Y.) Ch. 435; *Charles v. Clagett*, 3 Md. 82; *Marvin v. Titsworth*, 10 Wis. 320.

⁵ *Taylor v. Cornelius*, 60 Pa. St. 187. ⁶ *Taylor v. Emerson*, 4 Dru. & War. 117; *Holmes v. Matthews*, 3 Eq. Rep. 450.
 Also, see *Vance v. Lincoln*, 38 Cal. 586; *Koch v. Briggs*, 14 Cal. 256; *Comstock v. Stewart, Walk. (Mich.)* 110; *Myer's Appeal*, 42 Pa. St. 518; *Chambers v. Gold-*

CHAPTER VIII.

PAROL EVIDENCE TO PROVE AN ABSOLUTE DEED A MORTGAGE.

1. *The Grounds upon which it is admitted.*

282. It is a settled rule and practice of courts of equity to set aside a formal deed, and allow the grantor to redeem upon proof, even by parol evidence, that the conveyance was not a sale, but merely a security for a debt, and therefore a mortgage. Except where, as in New Hampshire and Georgia, the exercise of this power is prohibited by statute, there is probably now no dissent anywhere from the doctrine, that in equity a deed may be converted into a mortgage whenever there are proper equitable grounds for the exercise of the power. To this extent there is substantial uniformity in the decisions of the courts of the United States and of the several states. But as to the grounds upon which this equitable power is exercised there is much diversity of opinion, and there is also considerable diversity of adjudication in the application of the doctrine. Under what circumstances and upon what evidence this power shall be exercised, it is only reasonable to expect considerable divergence of practice in different courts. The cases in which the courts have been called upon to receive parol evidence to show that a deed absolute in terms is a mortgage are very numerous. For these reasons, and because the subject is of much practical importance, a statement of the rule in equity upon it in each of the states is given.

At law it is generally agreed that parol evidence to show that a deed absolute on its face was intended only as a mortgage is inadmissible.¹

¹ *Bryant v. Crosby*, 36 Me. 562; *Benton v. Jones*, 8 Conn. 186; *Reading v. Weston*, 8 Conn. 117; *Hogel v. Lindell*, 10 Mo. 483; *Farley v. Goocher*, 11 Iowa, 570; *Webb v. Rice*, 6 Hill (N. Y.), 219; *Bragg v. Massie*, 38 Ala. 89; *McClure v. White*, 5 Minn. 178; *Belote v. Morrison*, 8 Minn. 87; *Moore v. Wade*, 8 Kans. 380. In ILLINOIS it is admissible at law as well. *Tillson v. Moulton*, 23 Ill. 648; *Miller v. Thomas*, 14 Ill. 428; *Coates v. Woodworth*, 13 Ill. 654. So in WISCONSIN; see

Parol evidence is admissible in equity to show that a deed absolute in form is in fact a mortgage, not because the rules of evidence are different in equity from what they are at law, but because the jurisdiction and power of the court with reference to dealing with the facts presented are different. The rules of evidence are the same in both courts.

283. To obtain relief the plaintiff must have equitable grounds for it. — The grounds on which courts of equity admit oral evidence, to show that a deed absolute in form is in fact a mortgage, are purely equitable, and relief is refused whenever the equitable consideration is wanting. Therefore, when a debtor has made an absolute conveyance of his land to one creditor for the purpose of defrauding his other creditors, he is in no condition to ask a court of equity to interfere actively in his behalf to help him get his land back again, and thus secure to him the fruits of his fraudulent devices.¹ “One who comes for relief into a court whose proceedings are intended to reach the conscience of the parties must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns himself, he cannot insist upon applying it to the other party.”² An oral agreement between the debtor and creditor who took the conveyance, whereby the latter agreed to reconvey the land upon payment of the debt due him, is not deemed in such case an equitable ground for relief. The court will interfere only for the benefit of those whom the debtor intended to defraud. It is true that a grantee, whose rights were not infringed, cannot set up the grantor’s fraud against other creditors in the conveyance, to defeat any legal claim or interest which the fraudulent debtor may seek to enforce. But the difficulty is, that when the debtor has no legal right, but comes into equity seeking equitable relief, he has in such case no equitable standing, and must go out of court.

284. The English decisions are to the effect that in equity an absolute conveyance may be construed to be a mortgage when the

§ 320. In PENNSYLVANIA, § 312, and Arnold v. Mattison, 3 Rich. (S. C.) Eq. 153, TEXAS, § 316, there are no chancery and see Webber v. Farmer, 4 Bro. P. C. courts, and this evidence is admitted at 170; Baldwin v. Cawthorne, 19 Ves. 166. law.

² Mr. Justice Wells, in Hassam v. Bar-

¹ Hassam v. Barrett, 115 Mass. 256; rett, *supra*.

defeasance has been omitted by fraud or accident;¹ when the grantee has made a separate defeasance, although merely verbal;² or when by the payment of interest, or other circumstances, it appears that the conveyance was intended as a mortgage.³

285. The doctrine in the United States Courts. — The decisions of the Supreme Court of the United States, and the Circuit and District Courts, are uniform in admitting parol evidence to show that an absolute conveyance is in fact a mortgage.⁴ The admission of such evidence is not limited to cases in which express deceit or fraud in taking the conveyance in that form is shown. It is admitted where the instrument of defeasance has been “omitted by design upon mutual confidence between the parties.” It is admitted to show the real intention of the parties, and the real nature of the transaction. In *Russell v. Southard*, the Supreme Court declare that when it is alleged and proved that a loan was really intended, and the grantee sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and that whenever the transaction is in substance a loan of money upon security of the land conveyed, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance to be a mortgage.

286 In Alabama a court of equity will not by parol evidence establish a deed absolute on its face as a mortgage, “unless the proofs are clear, consistent, and convincing” that it was not intended as an absolute purchase, but was intended as a security for money.⁵ Such evidence seems to be admitted upon the ground of

¹ *Card v. Jaffray*, 2 Sch. & Lef. 374; *Cripps v. Jee*, 4 Bro. C. C. 472; *Sevier v. England v. Codrington*, 1 Eden, 169; *Greenway*, 19 Ves. 413.

² *Dixon v. Parker*, 2 Ves. Sen. 219, per Lord Hardwicke; *Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Ib. 219; *Lincoln v. Wright*, 4 De G. & J. 16.

³ *Manlove v. Bale*, 2 Vern. 84; *Lincoln v. Wright*, *supra*; *Whitfield v. Parfitt*, 15 Jur. 852.

⁴ *Allenby v. Dalton*, 5 L. J. K. B. 312;

⁴ *Russell v. Southard*, 12 How. 139; *Morris v. Nixon*, 1 How. 118; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Hughes v. Edwards*, 9 Wheat. 489; *Taylor v. Luther*, 2 Sum. 228; *Flagg v. Mann*, Ib. 486; *Jenkins v. Eldridge*, 3 Story, 181; *Bentley v. Phelps*, 2 Wood. & M. 426; *Wyman v. Babcock*, 2 Curtis, 386, 398; *S. C.* 19 How. 289.

⁵ *Phillips v. Croft*, 42 Ala. 477.

fraud, accident, or mistake.¹ It is in equity and not at law that parol evidence is admissible in such cases.²

287. In Arkansas parol evidence is admissible to show an absolute deed to be a mortgage,³ and the ground of its admission is stated in some of the cases to be fraud or mistake;⁴ but in later cases it seems to be held generally admissible to show the intention of the parties, and the fact that the transaction was in fact a mortgage.⁵

288. In California parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and such evidence is not restricted to cases of fraud, accident, or mistake. Evidence of the circumstances and relations existing between the parties is admitted, not for the purpose of contradicting or varying the deed but to establish an equity superior to its terms. The deed must speak for itself; but the objects and purposes of the parties in executing the instrument may be inquired into. Fraud in the use of the deed is as much a ground for the interposition of equity as fraud in its creation.

In *Pierce v. Robinson*,⁶ Mr. Justice Field forcibly and clearly declares these to be the true grounds for the admission of parol evidence to show that a deed absolute in its terms is in fact a mortgage. In further illustration of the reason of the rule, he says: "Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a

¹ *English v. Lane*, 1 Port. (Ala.) 328; *West v. Hendrix*, 28 Ala. 226; *Wells v. Morrow*, 38 Ala. 125; *Brantley v. West*, 27 Ala. 542; *Locke v. Palmer*, 26 Ala. 312; *Bryan v. Cowart*, 21 Ala. 92; *Parish v. Gates*, 29 Ala. 254; *Crews v. Threadgill*, 35 Ala. 334; *Bishop v. Bishop*, 13 Ala. 475.

² *Bragg v. Massie*, 38 Ala. 89, 106; *Jones v. Trawick*, 31 Ala. 256; *Parish v. Gates*, 29 Ala. 261.

³ *Johnson v. Clark*, 5 Ark. 321; *Scott v. Henry*, 13 Ark. 112; *McCarron v. Cassidy*, 18 Ark. 34.

⁴ *Blakenmore v. Byrnside*, 7 Ark. 505; *Jordan v. Fenno*, 13 Ark. 593.

⁵ *Anthony v. Anthony*, 23 Ark. 479.

⁶ *Pierce v. Robinson*, 13 Cal. 116; overruling the earlier cases of *Lee v. Evans*, 8 Cal. 424, and *Low v. Henry*, 9 Cal. 538; restricting such evidence to cases of fraud, accident, or mistake. And see, also, *Johnson v. Sherman*, 15 Cal. 287, 291; *Lodge v. Turman*, 24 Cal. 390; *Cunningham v. Hawkins*, 24 Cal. 403; *Gay v. Hamilton*, 33 Cal. 686; *Hopper v. Jones*, 29 Cal. 18; *Jackson v. Lodge*, 36 Cal. 28; *Vance v. Lincoln*, 38 Cal. 586; *Farmer v. Grose*, 42 Cal. 169; *Raynor v. Lyons*, 37 Cal. 452; *Kuhn v. Rummpp*, 46 Cal. 299.

trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the court, and rest in the simple good faith of the creditor. A mortgage, as I have observed, is in form a conveyance of the conditional estate, and the assertion of a right to redeem from a forfeiture involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. The conveyance upon condition by its terms purports to vest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident."

It is declared by statute that every transfer of an interest in real estate, other than in trust made only as a security for the performance of another act, is to be deemed a mortgage deed.¹ The fact that the transfer was made subject to defeasance may be proved, though it does not appear by the terms of the instrument.

289. In Connecticut the court in a recent case seemed to regard it as an undecided question whether parol evidence is admissible to show that an absolute deed is a mortgage.² In early cases it was held that such evidence was inadmissible in courts of law, either as between the parties or between third persons.³ An absolute deed may be shown to be a mortgage by evidence from any paper signed by the grantee, showing that the deed was given as security only.⁴ In equity parol evidence seems to have been admitted to show that the defeasance was omitted by fraud or mistake.⁵

290. Dakota Territory.—It is provided that every transfer of an interest in real estate not in trust made as a security for the performance of another act is to be deemed a mortgage; and the

¹ Civil Code, 1872, §§ 2924, 2925, and amendment 1874, p. 260.

² *Osgood v. Thompson Bank*, 30 Conn. 27.

³ *Reading v. Weston*, 8 Conn. 117; *S. C.* 7 *Ib.* 149; *Benton v. Jones*, 8 Conn. 186.

⁴ *Belton v. Avery*, 2 Root (Conn.), 279; *French v. Lyon*, *Ib.* 69.

⁵ *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alvord*, 2 Root, 196; *Collins v. Tillou*, 26 Conn. 368; *Bacon v. Brown*, 19 Conn. 29; *Jarvis v. Woodruff*, 22 Conn. 548; *Mills v. Mills*, 26 Conn. 213; *French v. Burns*, 35 Conn. 359; *Brainerd v. Brainerd*, 15 Conn. 575.

fact that the transfer was made subject to defeasance may be proved, though it does not appear by the terms of the instrument.¹

291. In Florida it is provided that all conveyances securing the payment of money shall be deemed mortgages. This statute, however, does not change the rule as to the admission of parol evidence to show that a deed absolute on its face was intended as a mortgage; but some ground for equitable interference must be shown, such as fraud, accident, or mistake in the execution of the instrument.² "This question," says Du Pont, C. J., "has been a fruitful source of litigation in the courts of the country, and there has been great diversity and contradiction in the adjudications of the several states constituting the late Union. In some of them any evidence going to show the intention of the parties is admissible to fix the character of the instrument; while in others it is held that such evidence only as tends to show fraud, accident, mistake, or trust, will be permitted. We are not aware that there has been any authoritative adjudication of the question in this state, and it is now presented to us as one of first impression. The theory upon which the former class of adjudications proceed is, that the fact of a deed being given as security determines its character, and not the evidence of the fact. Also, that parol evidence that a deed is a mortgage is not heard in contradiction of the deed, but in explanation of the transaction to prevent the perpetration of fraud by the mortgagee."

292. In Georgia it is provided by statute that a deed absolute on its face, accompanied with possession of the property, shall not be proved, at the instance of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried.³ Such a deed passes the legal title, and enables the grantee to recover possession by ejectment, although a formal mortgage does not.⁴ It may, nevertheless, be used as security for a debt.⁵ "It does not follow, because a mortgage is only security, that every security is only a common mortgage."⁶ The grantor in possession may defend his possession by pleading an equitable

¹ Civil Code, 1871, §§ 1610, 1612.

² *Chaires v. Brady*, 10 Fla. 133 (1863).

³ Code, 1873, p. 669; and see *Spence v. Steadman*, 49 Ga. 133, 139.

⁴ Code, § 1969.

⁵ *Broach v. Barfield*, 57 Ga. 601, 604.

⁶ *Biggers v. Bird*, 55 Ga. 650, 652.

plea and doing equity; that is, tendering the debt and interest. When the deed has served its purpose, that is, when the debt is discharged, the facts having been established by competent evidence, the creditor will be compelled to reconvey. He is treated as holding the title solely in trust for his former debtor.¹

293. In Illinois it is provided by statute that every deed of real estate intended as security, though absolute in terms, shall be considered as a mortgage.² In order to change an absolute sale into a mortgage, the evidence must clearly show the intention of parties to make a mortgage. Slight evidence is not sufficient. An absolute sale is valid if intended. To overcome the express terms of the deed, a debt must exist, and the liability to pay it. The kind of parol evidence which is properly receivable to show an absolute deed to be a mortgage is that of facts and circumstances of such a nature as, in a court of equity, will control the operation of a deed, and not of loose declarations of parties touching their intentions or understanding. The latter is a dangerous species of evidence upon which to disturb the title to land, being extremely liable to be misunderstood or perverted. If the papers show upon their face a conditional sale, or a sale and agreement for repurchase, to make the transaction a mortgage the evidence must do more than create a doubt as to the character of the transaction.³

Evidence of fraud, or undue advantage or oppression, is allowed, as tending to show that an absolute conveyance should be regarded as a mortgage.⁴ If the fact be established by parol evidence that there was a loan of money, equity regards the deed as

¹ *Biggers v. Bird*, *supra*; *Lacey v. Bostwick*, 54 Ga. 45.

² Rev. Stat. 1874, p. 713.

³ *Klock v. Walter*, 70 Ill. 416, and cases cited; *Remington v. Campbell*, 60 Ill. 516; *Wilson v. McDowell*, 78 Ill. 514; *Dwen v. Blake*, 44 Ill. 135; *Heald v. Wright*, 75 Ill. 17; *Taintor v. Keys*, 43 Ill. 332; *Price v. Karnes*, 59 Ill. 276; *Alwood v. Mansfield*, 59 Ill. 496; *Shays v. Norton*, 48 Ill. 100; *Christie v. Hale*, 46 Ill. 120; *Hunter v. Hatch*, 45 Ill. 178; *Pitts v. Cable*, 44 Ill. 103; *Parmelee v. Lawrence*, 44 Ill. 405; *Ewart v. Walling*, 42 Ill. 453; *Silsbee v. Lucas*, 36 Ill. 462; *Lindauer v. Cum-*

mings, 57 Ill. 195; *Sutphen v. Cushman*, 35 Ill. 186; *Roberts v. Richards*, 36 Ill. 339; *Reigard v. McNeil*, 38 Ill. 400; *Snyder v. Griswold*, 37 Ill. 216; *Preschbaker v. Feaman*, 32 Ill. 475; *Ennor v. Thompson*, 46 Ill. 215; *Weider v. Clark*, 27 Ill. 251; *Maxfield v. Patchen*, 29 Ill. 39; *Shaver v. Woodward*, 28 Ill. 277; *De Wolf v. Strader*, 26 Ill. 225; *Tillson v. Moulton*, 23 Ill. 648; *Davis v. Hopkins*, 15 Ill. 519; *Smith v. Cremer*, 71 Ill. 185; *Coates v. Woodworth*, 13 Ill. 654; *Miller v. Thomas*, 14 Ill. 428; *Magnusson v. Johnson*, 73 Ill. 156.

⁴ *Brown v. Gaffney*, 28 Ill. 149.

a security for the repayment of the money loaned.¹ To establish this fact, a parol agreement that the land conveyed should be held by the grantee as security for money loaned the grantor, or paid for his benefit, may be proved;² or that it should be held to indemnify the grantee for moneys to be paid by him on the debts of the grantor.³ In short, any evidence is admissible which tends to show the relations between the parties, or to show any other fact or circumstance of a nature to control the deed, and establish such an equity as would give a right of redemption.⁴

Mr. Justice Beckwith states very clearly the rule governing the admission of parol evidence in such cases:⁵ “In determining whether the transaction consummated by the deed in question was an absolute sale or should be regarded merely as a mortgage, we entirely disregard the testimony of those witnesses introduced for the purpose of establishing their understanding of the nature of the transaction, and who relate conversations of the parties. The conveyance purports to convey an absolute estate to the grantee, and it must be taken as the exponent of the rights of the parties, unless some equity is shown, not founded on the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed, but independently both of the deed itself and of the understanding with which it was executed. The right to redeem lands conveyed cannot be established by simply proving that such was the understanding on which the deed was executed, because equity, as well as the law, will seek for the understanding of the parties in the deed itself. The right must be one paramount to, and independent of, the terms of the deed, as well as of the understanding between the parties at the time it was executed. Parol evidence is admissible so far as it conduces to show the relations between the parties, or to show any other fact or circumstance of a nature to control the deed, and to establish such an equity as would give a right of redemption, and no further. In the application of this rule, parol evidence is received to establish the fact that a debt existed, or money was loaned on account of which the conveyance was made; for such facts will, in a court of equity, control the operation of the deed. So, too, in

¹ *Wynkoop v. Cowing*, 21 Ill. 570; *Williams v. Bishop*, 15 Ill. 555; S. C. 18 Ill. 101; *Smith v. Sackett*, 15 Ill. 530; *Davis v. Hopkins*, 15 Ill. 520.

² *Reigard v. McNeil*, 38 Ill. 400.

³ *Roberts v. Richards*, 36 Ill. 339.

⁴ *Sutphen v. Cushman*, 35 Ill. 186.

⁵ *Sutphen v. Cushman*, *supra*.

regard to any other fact or circumstance having the same operation. From some expressions of opinion in cases hitherto decided by this court, it has been supposed that a more enlarged rule has been adopted in this state, but a careful examination of them will show that this court has never departed from the rule we now enunciate."

294. Indiana.— The admission of parol evidence to show that an absolute deed was executed merely as security for the payment of money, or the performance of some act, is a well settled rule in this state.¹ The ground on which it is received seems to be fraud or mistake; and the attempt to set up such a deed as an absolute conveyance seems to be regarded in itself as a fraud. The proof that a mortgage was intended must be clear and decisive.²

295. In Iowa parol evidence is admissible, on the ground that to declare that to be a sale which was really a mortgage would be a fraud.³ Such evidence is not admitted to contradict or vary the written deed, but, as an exception to the rule, to show the intention of the parties. The burden of proving that a mortgage was intended is upon the party seeking to establish it as such, and the proof must be clear, satisfactory, and conclusive,⁴ and even then the evidence is received with caution. Inadequacy of the consideration paid is a strong circumstance to support the claim that the conveyance was intended to operate as a mortgage; and the fact that the grantor remains in possession is also to be considered in determining this question.⁵ The condition and conduct of the parties, and all the surrounding circumstances, will be weighed.

¹ *Heath v. Williams*, 30 Ind. 495; *Davis v. Stonestreet*, 4 Ind. 101; *Smith v. Parks*, 22 Ind. 59; *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361; *Blair v. Bass*, 4 Ib. 539; *Harbison v. Lemon*, 3 Ib. 51; *Conwell v. Evill*, 4 Ib. 67; *Cross v. Hipner*, 7 Ind. 359; *Crane v. Buchanan*, 29 Ind. 571.

² *Conwell v. Evill*, *supra*.

³ *Roberts v. McMahan*, 4 Greene (Iowa), 34; *Johnson v. Smith*, 39 Iowa, 549; *Berberick v. Fritz*, 39 Iowa, 700.

⁴ *Zuver v. Lyons*, 40 Iowa, 510; *Corbit v. Smith*, 7 Iowa, 60; *Hyatt v. Cochran*,

37 Iowa, 309; *Crawford v. Taylor*, 42 Iowa, 260; *Gardner v. Weston*, 18 Iowa, 533; *Green v. Turner*, 38 Iowa, 112; *Wilson v. Patrick*, 34 Iowa, 362; *Key v. McCleary*, 25 Iowa, 191; *Hyatt v. Cochran*, 37 Iowa, 309; *Childs v. Griswold*, 19 Iowa, 362; *Sunderland v. Sunderland*, 19 Iowa, 325; *Gardner v. Weston*, 18 Iowa, 533; *Cooper v. Skeel*, 14 Iowa, 578; *Atkins v. Faulkner*, 11 Iowa, 326; *Corbit v. Smith*, 7 Iowa, 60; *Noel v. Noel*, 1 Iowa, 423; *Holliday v. Arthur*, 25 Iowa, 19.

⁵ *Wilson v. Patrick*, 34 Iowa, 362; *Trucks v. Lindsey*, 18 Iowa, 504.

296. In Kansas it is declared that, although such evidence may not be admissible at law, it is in equity. Although no written defeasance was ever executed between the parties, their understanding, intention, or agreement may be shown to create a parol defeasance. The mortgage results from the facts of the case, and the statute of frauds and the statute relating to trusts, while making void parol agreements respecting land, do not make void an estate which results from, or is created by, operation of law. This evidence is admitted to show the facts of the case, which render the deed defeasible.¹

297. Kentucky. — Parol evidence is admitted in this class of cases upon the ground of fraud or mistake.² Especially if the transaction be infected with usury, it is admissible to show that the real character of the transaction is different from what it purports to be.³

298. In Maine, by statutory definition, mortgages of real estate include those made in the usual form in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time, or as part of the same transaction.⁴

Parol evidence is not admissible at law to convert an absolute deed into a mortgage.⁵ But in equity a resulting trust has been held to arise in favor of a grantor who has conveyed land by an absolute deed to secure a debt due to the grantee, under which redemption may be had within a reasonable time.⁶

299. Maryland. — Parol evidence is admitted only to show that the defeasance was omitted or destroyed by fraud or mistake.⁷ The fraud may be inferred from the facts and circum-

¹ *Moore v. Wade*, 8 Kans. 380.

² *Skinner v. Miller*, 5 Litt. (Ky.) 86; *Blanchard v. Kenton*, 4 Bibb (Ky.), 451.

³ *Murphy v. Trigg*, 1 Mon. (Ky.) 72; *Lindley v. Sharp*, 7 Ib. 248; *Cook v. Colyer*, 2 B. Mon. (Ky.) 71; *Stepp v. Phelps*, 7 Dana (Ky.), 296.

⁴ Rev. Stat. 1871, c. 90, § 1.

⁵ *Bryant v. Crosby*, 36 Me. 562; *Ellis*

v. Higgins, 32 Me. 34; *Thomaston Bank v. Stimpson*, 21 Me. 195.

⁶ *Richardson v. Woodbury*, 43 Me. 206; and see *Howe v. Russell*, 36 Me. 115; *Whitney v. Batchelder*, 32 Me. 313.

⁷ *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; S. C. 3 Ib. 508; *Farrell v. Bean*, 10 Md. 217; *Bend v. Susquehanna Bridge Co.* 6 H. & J. (Md.) 128; *Artz v.*

stances of the case, from the character of the contract, or from the condition of the parties.¹

300. In *Massachusetts* parol evidence is admitted in such cases not to vary, add to, or contradict the deed, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the deed by restraining its operation or defeating it altogether.² This doctrine is regarded as a sound and salutary principle of equity jurisprudence, when properly administered, but it is declared to be a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt. "It is not enough," says Mr. Justice Wells, "that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations,

Grove, 21 Md. 474; *Dougherty v. McColgan*, 6 G. & J. (Md.), 275; *Baughner v. Merryman*, 32 Md. 185; and see *Price v. Gover*, 40 Md. 102.

¹ *Thompson v. Banks*, 2 Md. Ch. 430; *Brogden v. Walker*, 2 H. & J. (Md.) 285; *Watkins v. Stockett*, 6 Ib. 435; *Davis v. Banks*, 3 Md. Ch. 138.

² *Campbell v. Dearborn*, 109 Mass. 130; and see *Newton v. Fay*, 10 Allen (Mass.), 505; *Glass v. Hulbert*, 102 Mass. 24; *Pond v. Eddy*, 113 Mass. 149; *McDonough v. Squire*, 111 Mass. 217; *McDonough v. O'Neil*, 113 Mass. 92.

Prior to the statute of 1855, c. 194, § 1, Gen. Stat. c. 113, § 2, conferring upon the Supreme Judicial Court jurisdiction in equity, "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages," the jurisdiction of the court in relation to the foreclosure and redemption of mortgages was confined to cases of a defeasance contained in the deed or in some other instrument under seal. *Eaton v. Green*, 22 Pick. 526; *Flagg v. Mann*, 14 Pick. 467, 478; *Lincoln v. Parsons*, 1 Allen. 388; *Coffin v. Loring*, 9 Allen, 154; *Flint v. Sheldon*, 13 Mass. 443; *Stackpole v. Arnold*, 11 Mass. 27; *Kelleran v. Brown*, 4 Mass. 445; *Boyd v. Stone*, 11 Mass. 342; *Bodwell v. Webster*,

13 Pick. 413; *Saunders v. Frost*, 5 Pick. 259.

But before that statute parol evidence had been frequently admitted where there was a deed and a provision for a reconveyance, to show the real nature of the transaction; and had construed the instruments as constituting a mortgage when it was shown that the transaction was really and essentially a loan of money. *Flagg v. Mann*, 14 Pick. 467, 478; *Rice v. Rice*, 4 Pick. 349; *Parks v. Hall*, 2 Pick. 206, 211; *Carey v. Rawson*, 8 Mass. 159; *Taylor v. Weld*, 5 Mass. 109; *Killeran v. Brown*, 4 Mass. 443; *Ersline v. Townsend*, 2 Mass. 493.

But the question, whether in the absence of any written defeasance an absolute deed could be converted into a mortgage, or restricted in its operation so as to allow a redemption, when shown to be in fact merely security for a loan, was not decided until it came before the court in *Campbell v. Dearborn*, *supra*, though the question had been discussed in *Newton v. Fay*, 10 Allen, 505, and, so far as concerned the statute of frauds, in *Glass v. Hulbert*, 102 Mass. 24. The opinion of Mr. Justice Wells, in *Campbell v. Dearborn*, contains a full and able discussion of the whole subject.

begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.”¹

Dissent is expressed in the opinion of the court already quoted from the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. “There can be no fraud, or legal wrong, in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit.”² The fault is in the original transaction, rather than in the grantee’s subsequent conduct in relation to it. As between borrower and lender, or debtor and creditor, an absolute deed given as security, and a renunciation of all legal right of redemption, are regarded as so significant of oppression, and so calculated to invite to or result in wrong and injustice on the part of the stronger towards the weaker party in the transaction, as in themselves to constitute a quasi fraud against which equity ought to relieve,—in the same way that it does against the strict letter of an express condition of forfeiture.³

301. Michigan.—Parol evidence is admissible to convert an absolute deed into a mortgage.⁴ It is admitted to show the intention of the parties in the transaction, but whether as an exception under the statute of frauds, or upon the ground of fraud, the court in one case expressly leave undetermined;⁵ but in another it is said, that neither the statute of frauds, nor the statute requiring powers and trusts to be created in writing, is encroached

¹ In *Campbell v. Dearborn*, *supra*, 143.

² *Ib.* 140.

³ Per Wells, J., in *Hassam v. Barrett*, 115 Mass. 256.

⁴ *Swetland v. Swetland*, 3 Mich. 482; *Wadsworth v. Loranger*, Har. (Mich.) Ch.

113; *Emerson v. Atwater*, 7 Mich. 12.

⁵ *Fuller v. Parrish*, 3 Mich. 211.

upon by a court of equity in exercising its jurisdiction in this class of cases; that a different construction would make them what they were never intended to be, a shield for the protection of oppression and fraud; that the court will interfere between creditor and debtor to prevent oppression; and that to give relief in such cases has ever been the province of courts of equity, whose chief excellence consists in a wise and judicious exercise of this part of their jurisdiction.¹

302. Minnesota. — Parol evidence is admissible in equity of the circumstances under which the deed was made, and the relation subsisting between the parties.² At first it was held to be admissible only upon the ground of fraud, mistake, or surprise in making or executing the instrument; but, subsequently, it was held to be admissible to show the real character of the transaction. In a court of law, such evidence cannot be received on any ground.³

303. In Mississippi it is well settled that parol evidence will be admitted in equity, to show that an absolute deed was intended to be a security for money, and therefore a mortgage.⁴ It is received to explain the true character of the transaction. For this purpose, the conduct of the parties at the time and subsequently, and all the attending circumstances, may be looked at; and when it is shown that the consideration of the conveyance was a loan or a debt, the courts always incline to regard it as a mortgage.⁵

304. Missouri. — A conveyance intended as a security, though absolute in form, is treated as a mortgage. Such intention may be shown by parol evidence, on the ground that the denial of the trust character of the deed by the grantee is a fraud on his part, which gives a court of equity jurisdiction of the case, and thus enables it

¹ *Emerson v. Atwater, supra.*

² *Weide v. Gehl*, 21 Minn. 449; *Phoenix v. Gardner*, 13 Minn. 430.

³ *McClane v. White*, 5 Minn. 178; keeping within the statute of frauds. *Belote v. Morrison*, 8 Minn. 87.

⁴ *Littlewort v. Davis*, 50 Miss. 403, and cases cited; *Freeman v. Wilson*, 51 Miss.

329, and cases cited; *Vasser v. Vasser*, 23 Miss. 378; *Soggins v. Heard*, 31 Miss. 426; *Anding v. Davis*, 38 Miss. 594; *Weathersly v. Weathersly*, 40 Miss. 469; *Prewett v. Dobbs*, 13 Sm. & M. (Miss.) 440; *Watson v. Dickens*, 12 Ib. 608.

⁵ *Freeman v. Wilson, supra.*

to hold to the verbal or implied defeasance as effectually as if this had been a formal written one.¹ It is not admissible at law.²

305. In Nebraska a formal conveyance may be shown to be a mortgage by extrinsic evidence. "This rule seems to be founded on the principle, that in such case the proof raises an equity, which does not contradict the writing or affect its validity, but simply varies its import so far as to show the true intention and object of the parties without a written defeasance, and establish the trust purpose for which the deed was executed. But to thus vary the legal import of such absolute deed, and especially when fraud, accident, mistake, or surprise is not alleged, the evidence in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear, certain, and conclusive, before a court of chancery will determine such writing to be a mortgage security only."³

306. In Nevada a conveyance absolute upon its face may be shown by parol to be a mortgage. It is not received to contradict the deed but to prove an equity superior to it.⁴ The proof on the part of the plaintiff must be clear, satisfactory, and convincing. The presumption is in favor of the natural effect of the instrument. The evidence to overcome such presumption should be so cogent, weighty, and convincing as to leave no doubt upon the mind.⁵

307. In New Hampshire it is provided by statute that no conveyance in writing of any lands shall be defeated, nor any estate incumbered by any agreement, unless it is inserted in the condition of the conveyance, and made part thereof, stating the sum of money to be secured, or other thing to be performed.⁶ But a proviso that if the grantor comply with the conditions of a

¹ O'Neill v. Capelle, 62 Mo. 202; and see Slowey v. McMurray, 27 Mo. 116; Tibeau v. Tibeau, 22 Mo. 77; Hogel v. Lindell, 10 Mo. 483; Johnson v. Huston, 17 Mo. 58; Wilson v. Drumrite, 21 Mo. 325.

² Hogel v. Lindell, 10 Mo. 483.

³ Schade v. Bessinger, 3 Neb. 140, and

see Wilson v. Richards, 1 Neb. 342; De-roin v. Jennings, 4 Neb. 97.

⁴ Cookes v. Culbertson, 9 Nev. 199; Saunders v. Stewart, 7 Nev. 200; Carlyon v. Lannau, 4 Nev. 159.

⁵ Bingham v. Thompson, 4 Nev. 224.

⁶ Gen. Stat.: Stat. 1867, c. 122, § 2; Stat. July 3, 1829; Boody v. Davis, 20 N. H. 140.

bond executed by him to the grantee at the same time, the deed shall be void, sufficiently sets forth the thing to be done.¹

Under this statute a parol agreement entered into between the grantor and grantee at the time of the delivery of the deed that the grantee should give a bond to reconvey, even after a bond is subsequently given in pursuance of such agreement, does not make the conveyance a mortgage.² Even a bond executed at the same time with the conveyance, providing that the conveyance shall be void upon payment of a certain sum of money, does not constitute a mortgage. The defeasance must be inserted in the deed itself; and a deed without such defeasance confers an absolute title upon the grantee.³

308. In New Jersey. — The efficacy of the parol evidence is not to establish an agreement to reconvey, the specific performance of which a court of equity will enforce, but to establish the true nature and effect of the instrument by showing the object for which it was made. It is well settled that this may be done.⁴ The question in every case is, whether the transaction was a sale and conveyance, coupled with an agreement for a reconveyance, or whether it was a security for a loan. "Any means of proof may be used to show it to be the latter: the declarations of the parties; the relations subsisting between them; the possession of the premises retained by the complainant; the value of the property, compared with the money paid; the understanding that the sums advanced should be repaid; and the payment of interest meanwhile on the amount. The distinction between parol evidence to vary a written instrument, and parol evidence showing facts which control its operation, is employed to reconcile the allowance of such proofs with the statute of frauds, and the general rule of common law. Deeds absolute on their face have been frequently decreed to be mortgages by this court, and the grantors allowed to redeem."⁵

¹ Bassett v. Bassett, 10 N. H. 64.

² Porter v. Nelson, 4 N. H. 130; Clark v. Hobbs, 11 N. H. 122; Boody v. Davis, 20 N. H. 140; Runlet v. Otis, 2 N. H. 167; Lund v. Lund, 1 N. H. 39.

³ Tift v. Walker, 10 N. H. 150.

⁴ Sweet v. Parker, 22 N. J. Eq. 453, 457; Crane v. Decamp, 21 N. J. Eq. 414;

Crane v. Bonnell, 1 Green (N. J.) Ch. 264; Youle v. Richards, Sax. (N. J.) Ch. 534; Lokerson v. Stillwell, 13 N. J. Eq. 358; Condit v. Tichenor, 19 N. J. Eq. 43; Vandegrift v. Herbert, 18 N. J. Eq. 466.

⁵ Per Vice Chancellor Dodd, in Sweet v. Parker, *supra*; and see Phillips v. Hulsizer, 5 C. E. Green, 308.

309. New York.—Such evidence was admitted in some of the earlier cases solely upon the ground of fraud or mistake.¹ But Chancellor Kent apparently thought the only fraud necessary to be shown to be the fraud on the part of the grantee in attempting to convert a mortgage into an absolute sale;² and it is distinctly asserted in other cases that it is not necessary to prove that the deed was given in this form through fraud or mistake.³ This evidence is admitted in all cases without reference to the reason why a written defeasance was omitted, or why the grantee denies the redeemable character of the conveyance. It is admitted to show what the transaction really was.

“It is now too late,” says Mr. Justice Allen, in a recent case,⁴ “to controvert the proposition that a deed, absolute upon its face, may in equity be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this state are fully committed to the doctrine; and whatever may be the rule in other states, here, in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact that the adjudications have entered into and controlled business transactions and become a rule of property, to authorize a

¹ Patchin v. Pierce, 12 Wend. (N. Y.) 61; Swart v. Service, 21 Wend. (N. Y.) 36; Stevens v. Cooper, 1 Johns. (N. Y.) Ch. 425; Strong v. Stewart, 4 Ib. 167; Marks v. Pell, 1 Ib. 594; Taylor v. Baldwin, 10 Barb. (N. Y.) 582; Webb v. Rice, 6 Hill (N. Y.), 219. In the latter case it was held that such evidence is inadmissible at law, and earlier cases at law in which it had been admitted were overruled.

² Strong v. Stewart, 4 Johns. (N. Y.) Ch. 167.

³ Brown v. Clifford, 7 Lans. (N. Y.) 46, per Mr. Justice Mullin: “I have said that parol evidence was admissible, although no fraud or mistake in making the deed was alleged or proved, and I say this, because in nearly all of the cases cited, and in the numerous others upon the same point, no fraud or mistake was either alleged or proved, nor was any sug-

gestion made that any such allegation or proof was necessary to justify the court in admitting the parol evidence.”

⁴ Horn v. Keteltas, 46 N. Y. 605, 609. And see Moses v. Murgatroyd, 1 Johns. (N. Y.) Ch. 119; Marks v. Pell, Ib. 599; Clark v. Henry, 2 Cow. 332; Whittiek v. Kane, 1 Paige, 206; Van Buren v. Olmstead, 5 Paige, 10; McIntyre v. Humphreys, 1 Hoff. 34; Hodges v. Tennessee Marine & F. Ins. Co. 8 N. Y. 416; Despard v. Walbridge, 15 N. Y. 374; Sturtevant v. Sturtevant, 20 N. Y. 39; Van Dusen v. Worrell, 4 Abb. App. Dec. 473; Stoddard v. Whiting, 46 N. Y. 627; Carr v. Carr, 52 N. Y. 251; S. C. 4 Lans. (N. Y.) 314; Meehan v. Forrester, 52 N. Y. 277; Brown v. Clifford, 7 Lans. (N. Y.) 46; Loomis v. Loomis, 60 Barb. (N. Y.) 22; Fiedler v. Darrin, 50 N. Y. 437.

reconsideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests, the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from.”¹

310. North Carolina.—Parol evidence seems to be admitted upon the general grounds of equity jurisdiction in cases of fraud, accident, and mistake.² “In equity, plaintiffs are allowed, by making the proper preliminary allegations,—as that a certain clause was intended to be inserted in a written instrument, but was omitted by the ignorance or mistake of the draughtsman; or by some fraud or circumvention of the opposite party; or some oppression or advantage taken of the plaintiff’s necessities; or when an unlawful trust was designedly omitted to evade the law,—to call for a discovery on the oath of the defendant. If the fact is

¹ The learned judge refers to the earlier cases in New York, saying: “The principle was recognized by the Chancellor in *Holmes v. Grant*, 8 Paige, 243; although it was not applied in that case, and had been before asserted under like circumstances in *Robinson v. Cropsey*, 2 Edw. Ch. 138; affirmed 6 Paige, 480.

“It was expressly adjudged in *Strong v. Stewart*, 4 Johns. Ch. 167, that parol evidence was admissible, to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is *Clark v. Henry*, 2 Cow. 324; which was followed by this court in *Murray v. Walker*, 31 N. Y. 399. In *Hodges v. Tennessee Marine & Fire Insurance Co.* 4 Seld. 416, the court says, that, ‘from an early day in this state the rule that parol evidence is admissible for the purpose named, has been established as the law of our courts of equity, and it is not fitting that the question should be re-examined, and the cases in which it has been so adjudged are cited with approval.’

“In *Sturtevant v. Sturtevant*, 20 N. Y. 39, the same judge pronouncing the opin-

ion as in the case last cited, distinguishes between the case of a mortgage and trust, and it was decided, that while a deed absolute in terms could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see *Despard v. Walbridge*, 15 N. Y. 374. The rule does not conflict with that other rule, which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid, whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties.” *Horn v. Keteltas*, 46 N. Y. 605, 610.

² *McDonald v. McLeod*, 1 Ired. (N. C.) Eq. 221; *Steel v. Black*, 3 Jones (N. C.) Eq. 427; *Cook v. Gudger*, 2 Ib. 172; *Glisson v. Hill*, 2 Ib. 256; *Sellers v. Stalcup*, 7 Ired. (N. C.) Eq. 13; *Elliott v. Maxwell*, 7 Ib. 246; *Blackwell v. Overby*, 6 Ib. 38; *Kelly v. Bryan*, 6 Ib. 283; *McLauri v. Wright*, 2 Ib. 94.

confessed, the plaintiff can have relief. If it be denied, although it was for a long time questioned, it is now settled that, provided the matter can be established, not merely by the declarations of the parties or the unaided memory of the witnesses, but by facts and circumstances *dehors* the instrument, such as are more tangible and less liable to be mistaken than mere words, equity will give relief, by considering the clause thus shown to have been omitted as if it had been set out in the instrument.”¹ Thus, where there was the preliminary allegation of oppression to account for the omission of the defeasance, and it was shown that the plaintiff was hard pressed for money, and was forced to consent to the omission of this clause; and it was further shown that there was great inadequacy of price, and that the plaintiff retained possession and paid interest, he was allowed to redeem.² The grantor having executed a deed, knowing it to be absolute, must be deemed to have intended it to be so, unless there is strong and clear proof of mistake or imposition.³ Parol evidence of admissions on the part of the grantee that the deed was intended as a mere security are not alone sufficient. There must also be shown facts or circumstances inconsistent with the idea of an absolute conveyance, and proof of fraud, oppression, ignorance, or mistake, so as to account for the conveyance being absolute on its face, when such was not the intention.⁴

311. Ohio. — Parol evidence is admitted to show whether an absolute deed be a mortgage or not. If given as a security it is a mortgage, whatever its form; and the fact of its being so given, and not the evidence of the fact, determines its character. In such case a trust arises in favor of the grantor. Being a tacit trust, it is more difficult to establish than one that is expressed, but when it is ascertained, the same consequences attach to it. The evidence for this purpose must be clear, certain, and conclusive.⁵

¹ *Kelly v. Bryan*, *supra*, per Pearson, J.

² *Streator v. Jones*, 3 Hawks (N. C.), 423; 1 Murph. 449.

³ *Elliott v. Maxwell*, 7 Ired. (N. C.) Eq. 246.

⁴ *Brothers v. Harrill*, 2 Jones (N. C.)

Eq. 209; *Cook v. Gudger*, *Ib.* 172; *Glisson v. Hill*, *Ib.* 256.

⁵ *Miami Ex. Co. v. U. S. Bank*, Wright (Ohio), 249, 252; *Cotterell v. Long*, 20 Ohio, 464; and see *Miller v. Stokely*, 5 Ohio St. 194; *Stall v. City of Cincinnati*,

16 *Ib.* 169.

312. Pennsylvania. — The courts of this state have no general equity jurisdiction. Mortgages are dealt with as matters of strict law; and yet parol evidence, under restrictions as to its sufficiency, is admitted to show that an absolute conveyance is in fact a mortgage.¹ "In strict law," says Chief Justice Lowrie, "no mortgage is allowed that is not proved by written evidence, and the judge may not admit any lower evidence on equitable grounds without seeing that justice imperiously demands it. The case of a lost instrument is a useful analogy. If, in such a case, the judge refuses to hear secondary evidence until he is perfectly satisfied that the justice of the case cannot be otherwise administered, much more, it would seem, ought this to be so where the evidence which the law makes, not merely primary but essential, never had any existence."² Therefore, it is held that mere evidence of verbal declarations by the parties, unless corroborated by other facts and circumstances, is not a proper substitute for the written evidence required by law.³ The presumption always is that the deed is what it purports to be. To prove it otherwise, the evidence must be clear and convincing. If the intention of the parties be to create a mortgage rather than a conveyance, this must be established, not merely by loose conversations between the parties, or by declarations to third persons, but by facts and circumstances outside the deed, inconsistent with the idea of an absolute purchase.⁴ The principle upon which parol evidence is admitted is to show and explain the true intention and purpose of

¹ *Odenbaugh v. Bradford*, 67 Pa. St. 96; *Kenton v. Vandergrift*, 42 Pa. St. 339; *Kellum v. Smith*, 33 Pa. St. 158; *Todd v. Campbell*, 32 Pa. St. 250; *Kunkle v. Wolfersberger*, 6 Watts (Pa.), 130; *Kerr v. Gilmore*, 6 Ib. 405, 414; *Kelly v. Thompson*, 7 Ib. 401; *Jaques v. Weeks*, 7 Ib. 268; *Friedley v. Hamilton*, 17 S. & R. (Pa.) 70; *Manufacturers' & Mechanics' Bank v. Bank of Penn.* 7 W. & S. (Pa.) 335; *Cole v. Bolard*, 22 Pa. St. 431; *Houser v. Lamont*, 55 Pa. St. 311; *Guthrie v. Kahle*, 46 Pa. St. 331; *Harper's Appeal*, 64 Ib. 315; 7 Phila. 276; *Rhines v. Baird*, 41 Ib. 256; *McClurkan v. Thompson*, 69 Ib. 305; *Fessler's Appeal*, 75 Ib. 483.

² *De France v. De France*, 34 Pa. St. 385.

"Equitable principles are continually insinuating themselves into the system of the law. Our law abounds with principles that were formerly purely equitable. And the process by which this takes place is perfectly natural; for, in the progress of society, and in the natural changes of its customs, exceptional principles are constantly demanding recognition, and continually enlarging their sphere, until they become general, and thus truly legal. In this way the social system keeps pace with the changes of social purposes and principles, and never requires any violent disruption." Per Lowrie, C. J.

³ *Todd v. Campbell*, 32 Pa. St. 250; *De France v. De France*, *supra*.

⁴ *Todd v. Campbell*, *supra*, per Strong, J.

the parties, in order to develop the real character of the transaction.¹ Whether the transaction is to be regarded as an absolute conveyance or a mortgage depends more upon its attendant circumstances than upon any express agreement making it defeasible; and it is doubtful whether parol proof of an agreement to reconvey standing alone, and without fraud, would be permitted to convert it into a mortgage. But facts and circumstances inconsistent with its being an absolute conveyance may be proved; and if they are clear and convincing enough to authorize a court of equity to infer that the conveyance was intended to secure a loan, under the jurisprudence of this state they should be submitted to a jury to find whether the transaction was a mortgage.² The proof must establish an agreement for a reconveyance substantially contemporaneous with the execution and delivery of the deed, and not rest on the subsequent admissions and declarations of the mortgagee only. The agreement need not, however, be express; it may be inferred from circumstances.³

313. Rhode Island. — Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.⁴

314. South Carolina. — Parol evidence is received to convert an instrument absolute on its face into a defeasible instrument, where the omission to reduce the defeasance to writing was occasioned by fraud or mistake.⁵ If it can be received in any other case the evidence must be very clear and convincing.⁶

315. Tennessee. — It is well settled that although a conveyance be absolute in its terms, it may be shown by parol proof to be a mortgage. It seems to be admitted for the purpose of showing

¹ *Kerr v. Gilmore*, 6 Watts (Pa.), 405, 414.

² *Rhines v. Baird*, 41 Pa. St. 256; *McClurkan v. Thompson*, 69 Ib. 305; *Plumer v. Guthrie*, 76 Ib. 441; *Baisch v. Oakeley*, 68 Ib. 92.

³ *Palmer v. Guthrie*, *supra*.

⁴ Less than this would not only conflict with the rules of evidence which prescribe

the manner in which a written instrument may be changed by parol, but also defeat the wise provision of the statute of frauds." Per *Mercur, J.*

⁵ *Taylor v. Luther*, 2 Sumn. 228; *Nichols v. Reynolds*, 1 R. I. 30.

⁶ *Arnold v. Mattison*, 3 Rich. (S. C.) Eq. 153.

⁷ *Arnold v. Mattison*, *supra*.

the intention of the parties and the real character of the transaction.¹ When a parol defeasance is shown, the effect of it is to reduce the title under an absolute deed to what was intended by the parties, a defeasible estate; a security for a debt, instead of a sale.² The evidence, however, must be clear and decisive, as the presumption is in favor of the deed as it appears upon its face.³

316. Texas.—The doctrine that parol evidence is admissible to prove that an absolute deed was intended merely as a security for the payment of a debt is fully recognized.⁴ It is admitted to show that the deed was really executed and delivered upon certain trusts, not reduced to writing, which the grantee promised to perform. These trusts existing in parol are established to prevent the fraudulent use of the deed or written instrument.⁵ It is not necessary that there should be any charge of fraud, mistake, or surprise, to afford a foundation for the introduction of such evidence.⁶ When it is attempted to use the deed for a fraudulent purpose, or one wholly different from that intended by the parties, equity interposes to prevent the fraud and establish the trust. The trust must be shown with clearness and certainty, and it has sometimes been said that it must be shown by the testimony of more than one witness, unless that testimony be supported by corroborating circumstances.⁷ As in Pennsylvania, there being no court of chancery, such evidence must be passed upon by a jury.⁸

¹ *Nichols v. Cabe*, 3 Head (Tenn.), 93; *Ruggles v. Williams*, 1 Ib. 141; *Hinson v. Partee*, 71 Humph. (Tenn.) 581; *Ballard v. Jones*, 6 Ib. 455; *Brown v. Wright*, 4 Yerg. (Tenn.) 57; *Lane v. Dickerson*, 10 Ib. 373; *Yarbrough v. Newell*, 10 Ib. 376; *Guinn v. Locke*, 1 Head (Tenn.), 110; *Jones v. Jones*, Ib. 105.

² *Ruggles v. Williams*, *supra*.

³ *Haynes v. Swann*, 6 Heisk. (Tenn.) 560; *Nickson v. Toney*, 3 Head (Tenn.), 655; *Hickman v. Quinn*, 6 Yerg. (Tenn.) 96; *Lane v. Dickerson*, *supra*; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Hammonds v. Hopkins*, Ib. 525.

⁴ *Gibbs v. Penny*, 43 Tex. 560; *Ruffier v. Womack*, 30 Tex. 332, 343; *Stampers*

v. Johnson, 3 Tex. 1; *Carter v. Carter*, 5 Tex. 93; *Hannay v. Thompson*, 14 Tex. 142; *Mead v. Randolph*, 8 Tex. 191; *Mann v. Falcon*, 25 Tex. 271; *Miller v. Thatcher*, 9 Tex. 482; *McClenny v. Floyd*, 10 Tex. 159; *Cuney v. Dupree*, 21 Tex. 211; *Grooms v. Rust*, 27 Tex. 231.

⁵ *Moreland v. Barnhart*, 44 Tex. 275; *Mead v. Randolph*, *supra*; *Grooms v. Rust*, *supra*.

⁶ *Mead v. Randolph*, *supra*; *Carter v. Carter*, *supra*.

⁷ *Moreland v. Barnhart*, 44 Tex. 275, 583, and cases cited.

⁸ *Carter v. Carter*, *supra*; *Moreland v. Barnhart*, *supra*; *Ruffier v. Womack*, 30 Tex. 332.

317. In Vermont parol testimony is admissible to show that a deed absolute in terms was in fact made as security for money loaned, if the grantor has remained in possession, and the title has continued in the grantee. If he has parted with the title, the grantor loses his right to redeem.

The fact that the grantor remains in possession is always regarded as a strong circumstance tending to show that the deed is a mortgage.¹ The absence of any written evidence of a debt does not make the deed less effectual as a mortgage.²

The ground upon which parol evidence is admitted seems to be that when the instrument is in fact a mortgage, and there is an attempt to set it up as an absolute conveyance, there is a fraudulent application or use made of it which a court in chancery may interfere with to prevent.³

318. Virginia. — Parol evidence is admitted in equity to determine whether a deed shall be considered a mortgage or an absolute purchase. The court is governed by the intention of the parties. The question is whether the parties intended to treat of a purchase, or to secure the repayment of money. To determine this, the whole circumstances of the transaction will be examined.⁴

319. West Virginia. — The rule in relation to the admission of parol evidence, to show that a deed is a mortgage, is the same that prevails in Virginia.⁵

320. In Wisconsin the admissibility of parol proof, to show a deed absolute on its face to be a mortgage, is the settled law.⁶

¹ *Hills v. Loomis*, 42 Vt. 562; *Rich v. Doane*, 35 Vt. 125; *Wright v. Bates*, 13 Vt. 341; *Baxter v. Willey*, 9 Vt. 276; *Campbell v. Worthington*, 6 Vt. 448; *Wing v. Cooper*, 37 Vt. 169; *Hyndman v. Hyndman*, 19 Vt. 9; *Bigelow v. Topliff*, 25 Vt. 273; *Mott v. Harrington*, 12 Vt. 199. In *Conner v. Chase*, 15 Vt. 764, it was held that such evidence was inadmissible to show that a deed of warranty, followed by possession through several successive grantees, by similar deeds, was a mortgage.

² *Graham v. Stevens*, 34 Vt. 166.

³ *Wright v. Bates*, 13 Vt. 348.

⁴ *Ross v. Norvell*, 1 Wash. (Va.) 14; *Thompson v. Davenport*, 1 Ib. 125; *King v. Newman*, 2 Munf. (Va.) 40; *Breckenridge v. Auld*, 1 Rob. (Va.) 148; *Dabney v. Green*, 4 Hen. & Munf. (Va.) 101; *Chapman v. Turner*, 1 Call (Va.), 244; *Robertson v. Campbell*, 2 Ib. 354; *Pennington v. Hanby*, 4 Munf. (Va.) 140; *Bird v. Wilkinson*, 4 Leigh (Va.), 266.

⁵ *Klinek v. Price*, 4 W. Va. 4, 9, citing the above cases in Virginia.

⁶ *Wilcox v. Bates*, 26 Wis. 465. "Notwithstanding what was said in the opinion

This is not only the rule in equity,¹ but at law as well. The evidence, however, must be clear and convincing, such as courts of equity require in such cases, and equal in force to that upon which a deed will be reformed. As to the grounds upon which the evidence is admitted, "it is the fraudulent use of the deed which equity interposes to detect and prevent, and, for this purpose, parol proof is admissible, not to vary the deed, but to maintain the equity which attaches to the transaction inherently, and which the deed or contract of the parties does not create, and cannot destroy. If an equity of redemption really attaches to the transaction itself, any attempt to defeat that equity by setting up the deed as absolute is fraudulent."²

21. A review of the cases, with reference to the grounds upon which parol evidence is admitted to prove that an absolute conveyance is a mortgage in equity, will show that in the earliest cases, both in England and America, it was admitted solely upon the ground of fraud, accident, or mistake, which are ordinary grounds of equity jurisdiction. In several states this is still declared by the courts to be the only ground upon which their interference, in such case, can be justified; or, at any rate, there have been no decisions which distinctly place such interference upon any other ground. Such seems to be the doctrine in Alabama, Connecticut, Florida, Indiana, Kentucky, Maryland, North Carolina, Rhode Island, and South Carolina.³

In a few states, as for instance Iowa, Missouri, Vermont, and Wisconsin, it is declared that it is fraud on the part of the grantee

in *Rasdall v. Rasdall*, 9 Wis. 379, as to the admissibility of parol evidence to prove an absolute deed a mortgage, upon principle, it has since been frequently held by this court that the admissibility of such evidence had been so long established by authority as to have become a rule of property, which ought not to be changed by the judicial department." Per Paine, J., and see *Plato v. Roe*, 14 Wis. 453; *Sweet v. Mitchell*, 15 Wis. 641; *Spencer v. Fredendall*, 15 Wis. 666.

¹ *Kent v. Agard*, 24 Wis. 378; *Kent v. Lasley*, 24 Wis. 654. "The doctrine that a deed absolute in its terms can be thus transformed into a mortgage, and the title

of the holder defeated, is purely an equitable, and not a legal, doctrine. It had its origin in the court of chancery, in which court alone the remedy could formerly be administered. The rules and practice of that court were such as to afford many safeguards to the rights of the grantee, and to obviate many evils which must otherwise have grown up out of the doctrine." Per Dixon, C. J.

² *Rogan v. Walker*, 1 Wis. 527.

³ See §§ 285, 300; also *Maxwell v. Mountaente*, Pree. Ch. 526; *Walker v. Walker*, 2 Atk. 99; *Joynes v. Statham*, 3 Ib. 388; *Pym v. Blackburn*, 3 Ves. 38; *Townshend v. Stangroom*, 6 Ves. 328.

to insist that the conveyance is absolute, when, in fact, it was in its origin intended to be redeemable. In Maine, Ohio, and Texas, the intention of the parties to create a security only seems to be regarded as raising a trust in favor of the grantor which equity will enforce.

But the doctrine in this country, now more generally accepted, is, that the admission of parol evidence is not confined to cases of distinct fraud on the part of the grantee in obtaining a deed without a defeasance, or mistake on the part of the grantor in giving such a deed. The doctrine declared by the Supreme Court of the United States in *Russell v. Southard*,¹ and by the Supreme Court of Massachusetts in recent cases,² is, that the mere fact that an absolute deed was intended as security merely affords ground of jurisdiction to courts of equity to interfere and give relief; that a security in this form is so calculated to be an instrument of oppression and wrong as in itself to constitute a *quasi* fraud, which equity should relieve against; that the fraud, or fault, is inherent in the transaction itself, and does not arise out of the subsequent conduct of the grantee in attempting to retain the property. This doctrine is declared with more or less distinctness in the later decisions of the courts of Arkansas, California, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, Pennsylvania, Tennessee, Virginia, and West Virginia.

322. The statute of frauds was at first supposed to stand in the way of allowing a grant, absolute on its face, to be established by parol evidence as a mortgage. But the courts, after a struggle and much hesitation, established the doctrine, as otherwise it was found that the statute designed to prevent frauds and perjuries would become in this way an effectual instrument of fraud or injustice.³ Although the admission of such evidence is placed upon different grounds by different courts, there is substantial unanimity in holding that, when once the fact is established that the grant was intended as a mortgage, the conveyance will be so regarded. The statute of frauds does not interpose any insuperable obstacle to granting relief in such a case, because relief, if granted, is obtained by setting aside the deed; and parol evidence is

¹ § 285.

³ Carr v. Carr, 52 N. Y. 251.

² § 300.

availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. The equities of the parties are adjusted according to the nature of the transaction and the facts and circumstances of the case, including the real agreement. It does not violate the statute of frauds to admit parol evidence of the real agreement as an element in the proof of fraud or other vice in the transaction, which is relied upon to defeat the written instrument.¹ Lord Hardwicke said that such evidence has nothing to do with the statute of frauds.²

323. Grantor not estopped to show the true character of the conveyance. — One who has conveyed by absolute deed, but, in fact, merely as a security for a loan, is not estopped from showing the true character of the transaction by reason that he has sworn, on an application for discharge in bankruptcy, that he had no interest in the land. The original transaction being without fraud, the subsequent improper conduct of the mortgagor, even if he were guilty of perjury, would not affect his right. At any rate the mortgagee cannot make the misconduct of the mortgagor, about which he need not concern himself, a ground for the non-performance of his own contract.³ The statute of frauds cannot be set up as inconsistent with showing that an absolute deed was intended by the parties merely as a security for the payment of money.⁴ If the grantee deny the trust raised by a verbal defeasance, on proof of the trust, such denial is regarded in some courts as a fraud, and the grantee is held to be as firmly bound by his verbal agreement as he would be by a written one, "hedged about with all the formal solemnity known to the law."⁵ An agreement, however, between the grantee and a third person that the land shall be conveyed to him upon the payment by him of the purchase money and interest, is within the statute of frauds; because such a conveyance and agreement do not constitute a mortgage.⁶ To constitute a mortgage such agreement must be made

¹ *Campbell v. Dearborn*, 109 Mass. 130, per Wells, J.; and see *Glass v. Hulbert*, 102 Mass. 24; *Newton v. Fay*, 10 Allen (Mass.), 505.

² *Walker v. Walker*, 2 Atk. 98.

³ *Smith v. Cremer*, 71 Ill. 185.

⁴ *Russell v. Southard*, 12 How. 139;

Maffitt v. Rynd, 69 Pa. St. 380, 387, and cases cited; *Houser v. Lamont*, 55 Ib. 311; *Payne v. Patterson*, 77 Ib. 134; *Lee v. Evans*, 8 Cal. 424; *Raynor v. Lyons*, 37 Cal. 452.

⁵ *O'Neill v. Capelle*, 62 Mo. 202.

⁶ *Payne v. Patterson*, 77 Pa. St. 134;

with the grantor and not with a stranger. A promise by a third person to purchase the property, and convey it to the grantor, is open to the same objection.¹

2. *What Facts are considered.*

324. The true character of the conveyance will be inquired into, and effect given to the intention of the parties as ascertained by their conduct and declarations at the time and subsequently.² Thus, a verbal agreement made at the time of the conveyance, that it shall operate as security for a loan of money, if clearly proved, is decisive of the character of the transaction.³ And so is an agreement that the deed shall stand only as security for a debt, and that in case of a sale by the grantee the excess of the proceeds over the debt shall be paid to the grantor. Such an agreement and deed constitute a mortgage; and therefore the agreement is not void, as an attempt to create a trust by parol.⁴ But it is said in some cases, that parol evidence of such an agreement should be supported by other facts and circumstances which are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended.⁵

325. Evidence of the continuance of the debt, such as the payment of interest upon it, or the extension of the time of payment, is generally conclusive of the character of the original transaction as a mortgage.⁶ It shows either that the preëxisting debt was not surrendered or cancelled at the time of the conveyance; or in case there was no such debt, it shows that one was then created.⁷ If the mortgagee retains the evidence of a preëxisting in-

Wilson v. McDowell, 78 Ill. 514; and see Sweet v. Mitchell, 15 Wis. 641.

¹ Wilson v. McDowell, *supra*; Stephenson v. Thompson, 13 Ill. 186; Perry v. McHenry, *Id.* 227.

² See § 258; Russell v. Southard, 12 How. 139; Crane v. Bonnell, 2 N. J. Eq. (1 Green) 264; Freeman v. Wilson, 51 Miss. 329; Daubenspeck v. Platt, 22 Cal. 330; Lodge v. Turman, 24 Cal. 385; Tibeau v. Tibeau, 22 Mo. 77; Purviance v. Holt, 8 Ill. 394; Reigard v. McNeil, 38 Ill. 400; Whitcomb v. Sutherland, 18 Ill. 578; Williams v. Bishop, 15 Ill. 553; Cole v. Bolard, 22 Pa. St. 431; Prewett v.

Dobbs, 13 S. & R. (Pa.) 431; Eiland v. Radford, 7 Ala. 724; Carter v. Carter, 5 Tex. 93; Overton v. Bigelow, 3 Yerg. (Tenn.) 513; Lane v. Shears, 1 Wend. (N. Y.) 433.

³ Anthony v. Anthony, 23 Ark. 479; Anding v. Davis, 38 Miss. 574.

⁴ Crane v. Buchanan, 29 Ind. 570.

⁵ Blackwell v. Overby, 6 Ired. (N. C.) Eq. 38; Kelly v. Bryan, *Id.* 283.

⁶ See § 265; Ruffier v. Womack, 30 Tex. 332; Eaton v. Green, 22 Pick. (Mass.) 526, 530.

⁷ Farmer v. Grose, 42 Cal. 169.

debtedness, and receives rent from the mortgagor, this will be regarded as a payment of interest, and an evidence of a mortgage.¹ The taking of judgment for the consideration money is evidence that an absolute deed was intended to be a mortgage.²

“In all this class of cases,” says Chief Justice Poland,³ “one principle has universally been recognized, that in order to convert a conveyance absolute upon its face into a mortgage, or security merely, there must be a debt to be secured. Some of the cases go so far as to hold that there must be a debt in such form that it can be enforced by action against the debtor, while others have denied it. We have no occasion now to decide whether the debt must be such that it could be enforced by action against the debtor; the tendency of later cases seems to be against it. But all agree that there must be a debt or loan to be secured, that the relation of debtor and creditor must exist between the grantor and grantee, in order to lay the foundation for converting an absolute deed in form into a mere security. In this case there was no note or bond, or other evidence of debt executed by the defendants; and though this is by no means conclusive, still it is a circumstance favorable to the orator, as if the parties intended the conveyance merely as a security for a loan or debt, it would have been natural that the ordinary evidence of a debt should have been required and given.” Of course, where there is no written acknowledgment of a debt or express promise to pay, the party who attempts to impeach the deed is obliged to make out his proofs by other and less decisive means. The absence of such evidence of debt is far from being conclusive that the transaction was a sale.⁴ Formal mortgages are sometimes made without any personal liability on the part of the mortgagor. Moreover, when it is considered that the occasion for any inquiry in such case, as to the nature of the transaction, arises from the adoption of forms and outward appearances supposed to differ from the fact, it is hardly reasonable that the absence of a written contract of debt should be regarded as of more significance than the absence of a formal defeasance.⁵

¹ *Ennor v. Thompson*, 46 Ill. 214.

² *Hamet v. Dundass*, 4 Pa. St. 178.

³ *Rich v. Doane et al.* 35 Vt. 125, 128.

⁴ *Flagg v. Mann*, 14 Pick. (Mass.) 467,
478; *Brown v. Dewey*, 1 Sandf. (N. Y.)

Ch. 56; *Russell v. Southard*, 12 How.
139; *Robinson v. Farrelly*, 16 Ala. 472.

⁵ Per Wells, J., in *Campbell v. Dearborn*, 109 Mass. 130, at 144.

326. When the transaction is shown to have been based upon a preëxisting debt, the question to be settled is, whether the intention of the parties was to cancel that debt or to secure it. This is a question of fact, for the determination of which not only the negotiations had at the time of the conveyance, but also the subsequent acts of the parties in relation to it, are to be considered. The mere fact that there was a debt at the time is not conclusive that the conveyance was a mortgage for its security. It can hardly be said that it raises a presumption of a mortgage, though the courts have generally manifested a disposition to construe all conveyances coupled with a stipulation for a reconveyance at a future day as mortgages. But whatever presumption of this kind there may be, it is readily repelled by any facts showing that the debt was surrendered and cancelled at the time of the conveyance. The burden is then upon the grantor to show that the deed is not to have effect according to its terms.¹

Although the securities are not surrendered, if the debt is absolutely extinguished a simple right to repurchase does not make the conveyance a mortgage.² Whether the transaction is a mortgage or not is determined by the answer to the inquiry, whether it was the intention of the parties to secure the payment of the debt or to extinguish it.³ If the object of the parties was to satisfy the debt, the conveyance must necessarily vest the estate absolutely in the grantee, and it cannot of course take effect as a mortgage;⁴ even if the conveyance contains a redemption clause.⁵ But the fact that the evidence of the indebtedness is retained after the conveyance is strong evidence that it was taken merely as security.⁶

327. The transaction may have been a sale, although the application of the grantor was in the first place for a loan. In such a case, the person applied to having refused to deal except as a purchaser, and a conveyance having been made to him with-

¹ See §§ 267, 269; *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138; *Ford v. Irwin*, 18 Cal. 117; 14 Ib. 428; *Baisch v. Oakeley*, 68 Pa. St. 92.

² *Baxter v. Willey*, 9 Vt. 276.

³ *Bigelow v. Topliff*, 25 Vt. 273; *Toler v. Pender*, 1 Dev. & B. N. C. Eq. 445; *Todd v. Campbell*, 32 Pa. St. 250; and see

Alleghany R. & Coal Co. v. Casey, 79 Ib. 84.

⁴ *Slee v. Manhattan Co.* 1 Paige (N. Y.), 48; *Hoopes v. Bailey*, 28 Miss. 328; *Carter v. Williams*, 23 La. Ann. 281.

⁵ *West v. Hendrix*, 28 Ala. 226.

⁶ *Ennor v. Thompson*, 46 Ill. 214.

out his giving any contract to reconvey, the court refused, after a long lapse of time, to convert the transaction into a mortgage, upon evidence of loose conversations to the effect that the grantee would reconvey upon repayment, although coupled with evidence of inadequacy of consideration.¹

328. The continued possession of the grantor is also evidence tending to show that the conveyance was a mortgage.² This fact alone is not very important, but adds weight to other considerations which tend to this conclusion.

329. Inadequacy of price is also a circumstance tending to show that the transaction is a mortgage rather than a sale, just as it is when there is a written agreement for a reconveyance.³

330. Delay in asserting an absolute deed to be a mortgage has not the same effect upon the rights of the parties that attends delay in seeking to enforce in equity the performance of an executory contract.⁴ Once a mortgage always a mortgage is the maxim of the law, and payment does not stand on the footing of performance in equity. The character of the deed being fixed by the evidence as conditional, the mortgagor has the same time to make payment that any other debtor has. The only effect that delay can have in such a case is in its bearing on the primary question of mortgage or no mortgage. The poverty of the mortgagor, and many other circumstances, may sufficiently explain this. No lapse of time short of that which is sufficient to bar the action will prevent the introduction of parol evidence to show a deed was "intended as a mortgage."⁵

But lapse of time, in connection with other evidence, is a cir-

¹ *De France v. De France*, 34 Pa. St. 385. Ala. 334; *Daubenspeck v. Platt*, 22 Cal. 330.

² See § 274; *Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & J. 16; *Ruffier v. Womack*, 30 Tex. 332; *Campbell v. Dearborn*, 109 Mass. 130, 145; *Steel v. Black*, 3 Jones (N. C.) Eq. 427; *Streator v. Jones*, 3 Hawks (N. C.), 423; *Sellers v. Stalcup*, 7 Ired. (N. C.) Eq. 13; *Kemp v. Earp*, 1b. 167; *Thompson v. Banks*, 2 Md. Ch. 430; *Crews v. Threadgill*, 35

³ See § 275; *Davis v. Stonestreet*, 4 Ind. 101; *Wilson v. Patrick*, 34 Iowa, 362, and cases cited; *Trucks v. Lindsey*, 18 Iowa, 504; *West v. Lindsey*, 28 Ala. 226; *Crews v. Threadgill*, 35 Ala. 334; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Gibbs v. Penny*, 43 Tex. 560.

⁴ *Odenbaugh v. Bradford*, 67 Pa. St. 96.

⁵ *Anding v. Davis*, 38 Miss. 574.

cumstance to be considered.¹ When the grantor had conveyed by a warranty deed, and possession followed the deed through several successive grantees, parol evidence that a mortgage was intended has been refused. Length of time short of the period that will bar redemption affords a strong presumption against such a claim.² A lapse of fourteen years from the time of the transaction has been considered a material circumstance.³

331. It is immaterial that the conveyance should be made by the debtor. — It is sufficient that he has an interest in the property, either legal or equitable. Having such an interest, if he procure a conveyance of the property to one who pays the price of it, or makes an advance upon it, under an arrangement that he shall be allowed to have the property upon repaying the money advanced, he has a right to redeem. The grantee in such case acquires title by his act, and as security for his debt, and therefore holds the title as his mortgagee.⁴ Thus, a person who advances for another at his request the purchase money of land which the latter contracted to buy, and the deed be made to the person who advanced the money, he is as much a mortgagee as if the land had been conveyed to him directly by the debtor.⁵ If part only of the purchase money be advanced by such grantee, he has a lien upon the whole land, and not merely upon an undivided interest in proportion to the amount of his advance.⁶

Therefore when a trustee, at the request of the husband of the *cestui que trust*, and acting as her agent in fact, sold certain trust land to one who agreed to convey the land to the husband on his repaying the purchase money, it was declared that the transaction did not constitute a mortgage, and could not be dealt with as such.⁷ In like manner, where one at the request of a debtor whose land had been sold on execution purchased the land, agreeing by parol with the debtor that, upon his paying the purchase money and interest, he would convey it to him, or if the land should be sold for more than this to pay the surplus to the debtor,

¹ Tull v. Owen, 4 Y. & C. 192.

(N. Y.) 390; Wright v. Shumway, 1 Biss.

² Connor v. Chase, 15 Vt. 764.

23; Houser v. Lamont, 55 Pa. St. 311.

³ De France v. De France, 34 Pa. St. 385.

⁵ Hidden v. Jordan, 21 Cal. 92.

⁶ Hidden v. Jordan, *supra*.

⁴ See §§ 241, 268; Stoddard v. Whiting, 46 N. Y. 627; Carr v. Carr, 52 N. Y. 251; McBarney v. Wellman, 42 Barb.

⁷ Penn. Co. Ins. v. Austin, 42 Pa. St. 257.

it was held that this transaction did not constitute a mortgage, because the debtor had no interest in the land at the time of this agreement, and of the purchase made in consequence of it. The purchase was not conditional between such purchaser and his grantor, who alone was interested in the property at that time. There was no agreement that the land was, under any circumstances, to revert to his grantor. But if one holding a bond or agreement for a deed, after paying a portion of the purchase money, procure a third person to pay the balance, and the land is conveyed to him as security, he agreeing to reconvey within a certain time on payment of his advances, the transaction is a mortgage.¹ Such holder of the agreement for purchase has an interest in the land by reason of the payment made by him.

332. Sometimes regarded as a trust. — One who purchases at a foreclosure sale for the benefit of the mortgagor, and thus acquires the title at a price below the value of the property, may be deemed a trustee of the party for whom he has undertaken the purchase.² Such an agreement, although verbal merely, is not within the statute of frauds. The trust in such case arises or results upon the conveyance. It is a fraud to refuse to execute the agreement, and a court of equity will not permit the grantee to use the statute of frauds as an instrument of fraud. It would seem, however, that there can be no resulting trust unless the person claiming it has some interest in the property. “If A. purchases an estate with his own money,” says Chancellor Kent, “and takes the deed in the name of B., a trust results to A. *because he paid the money*. The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds.”³ This distinction is illus-

¹ *McClintock v. McClintock*, 3 Brewst. (Pa.) 76.

² *Ryan v. Dox*, 34 N. Y. 307; *Brown v. Lynch*, 1 Paige (N. Y.), 147; *Sandfoss v. Jones*, 35 Cal. 486; *Reece v. Roush*, 2 Mont. 586, and cases cited; and see *McDonough v. O’Niel*, 113 Mass. 92.

³ *Botsford v. Burr*, 2 Johns. (N. Y.) Ch.

405; followed in *Magnusson v. Johnson*, 73 Ill. 156; *Perry v. McHenry*, 13 Ill. 227, and cases cited; *Stephenson v. Thompson*, Ib. 186; *Holmes v. Holmes*, 44 Ill. 168; *Ranstead v. Otis*, 52 Ill. 30; *Robertson v. Robertson*, 9 Watts (Pa.), 32; *Haines v. O’Conner*, 10 Ib. 313.

trated by a case which was twice before the Supreme Court of Illinois.

Land having been advertised for sale under a senior mortgage, the owner and the junior mortgagee arranged with a third person to bid the land off for the amount of both mortgages, and the junior mortgagee furnished the money to pay the amount due on the first mortgage, with the understanding that the owner might have further time in which to sell the land and pay off the amount due on both mortgages, with interest upon them. The transaction was held to amount to a mortgage, and to entitle the owner to a conveyance upon payment according to the understanding.¹ But when the case was first before the court, it did not appear that the owner had paid any portion of the purchase money at the sale, and therefore the bill to enforce the trust was dismissed.² In like manner, it may be shown that one purchasing at a sheriff's sale really purchased for the benefit of the debtor, and upon agreement to convey to him upon a subsequent repayment of the amount paid.³ The trust may be supported, it would seem, even when the person who claims the benefit of the purchase has not actually paid any money towards the purchase, if under an arrangement with the purchaser he has abstained from bidding himself, so that the purchaser has obtained the property at a price much below its real value. The person for whom the property was bought under such an arrangement is considered as having an interest in it.⁴

A transaction whereby one who is embarrassed conveys land to another, on his promise to obtain a loan for him to pay his debts from a building association, and apply the rents to the repayment of the loan, and to reconvey the land when the building associa-

¹ *Klock v. Walter*, 70 Ill. 416. See Illinois cases cited on rule that absolute conveyance as a security is a mortgage.

² *Walter v. Klock*, 55 Ill. 362.

In *Merritt v. Brown*, 19 N. J. Eq. 286, where the purchaser at a foreclosure sale agreed to allow the mortgagor to repurchase within a given time, it was held that he was not entitled to relief after that time. He had paid nothing, and no trust resulted in his favor.

³ *Hiester v. Maderia*, 3 Watts & S. (Pa.) 384; *Guinn v. Locke*, 1 Head (Tenn.), 110;

Barkelew v. Taylor, 8 N. J. Eq. (4 Halst.) 206. See *Price v. Evans*, 26 Mo. 30, where an agreement to reconvey in such case was regarded as a temporary privilege and not a mortgage, in view of the circumstances of the case; *Sahler v. Signer*, 37 Barb. (N. Y.) 329; *Smith v. Doyle*, 46 Ill. 451; *Roberts v. McMahan*, 4 Greene (Iowa), 34.

⁴ *Barkelew v. Taylor*, 8 N. J. Eq. (4 Halst.) 206; *Marlatt v. Warwick*, 18 N. J. Eq. 108.

tion shall expire, is a mortgage and not a trust.¹ Whenever there is in fact an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts the transaction into a mortgage, whatever may be the understanding of the parties.² Even a sheriff's sale will be converted into a mortgage when it is made the means to carry out the agreement of the parties to raise money by way of loan, and the loan is made in consequence of it.³

333. Absolute assignment of a mortgage as collateral. — The same rules that determine the admissibility of parol evidence to establish an absolute deed as a mortgage are equally applicable to show that an assignment of a mortgage, absolute in form, is in fact not a sale, but only collateral security for a loan.⁴ The chief inquiry always is, whether a debt was created by the transaction and continued afterwards. The character of security once having attached to the mortgage, this character continues through whatever changes it may undergo in the hands of the assignee; and attaches to money collected upon the mortgage, and to a title that has become absolute by foreclosure.⁵

334. An assignment of a contract of purchase as security is a mortgage, and when the assignee has completed the payments and taken a conveyance to himself, the relation of the parties remains the same. Under the principle, once a mortgage always a mortgage, the transaction retains that character until it is either foreclosed or redeemed.⁶

335. Strict proof required. — One who alleges that his deed in absolute form was intended as a mortgage only is required to make strict proof of the fact. Having deliberately given the transaction the form of a bargain and sale, slight and indefinite evidence should not be permitted to change its character.⁷ The

¹ Danzeisen's Appeal, 73 Pa. St. 65; and see *Church v. Cole*, 36 Ind. 34.

² *Harper's Appeal*, 64 Pa. St. 315, 320; and see *Steinruck's Appeal*, 70 Pa. St. 289.

³ *Sweetzer's Appeal*, 71 Pa. St. 264

⁴ *Pond v. Eddy*, 113 Mass. 149

⁵ *Ib.*

⁶ *Smith v. Cremer*, 71 Ill. 185.

⁷ *Magnusson v. Johnson*, 73 Ill. 156; *Smith v. Cremer*, 71 Ill. 185; *Price v. Karnes*, 59 Ill. 276; *Tainter v. Keys*, 43 Ill. 332; *Dwen v. Blake*, 44 Ill. 135; *Par-melee v. Lawrence*, *Ib.* 405.

proof must be clear, satisfactory, and convincing.¹ The fact that the grantor understood the transaction to be a mortgage is not alone sufficient to prove it to be so.² One who has assigned a contract for the purchase of real estate and permitted the assignee to take an absolute deed from the owner cannot be allowed to redeem upon an allegation, without proof, that the transaction was in fact a mortgage, and that he assented to it upon the confidence that it would be so treated by his creditor.³ Testimony of admissions by the grantee made subsequently to the conveyance that the conveyance was intended as a mortgage may, with corroborating circumstances, be sufficient to establish the fact,⁴ but alone are not sufficient.⁵

When, however, it is once admitted that the deed was made merely to secure a debt, and the question is, what is the amount of the debt, the burden is upon the grantee to show it.⁶

¹ *Jones v. Brittan*, 1 Woods, 667; *Bingham v. Thompson*, 4 Nev. 224; *Conwell v. Evill*, 4 Blackf. (Ind.) 67; *Williams v. Stratton*, 18 Miss. (10 Sm. & M.) 418; *Moore v. Ivery*, 8 Ired. (N. C.) Eq. 192; *Arnold v. Mattison*, 3 Rich. (S. C.) Eq. 153; *Williams v. Cheatham*, 19 Ark. 278.

² *Holmes v. Fresh*, 9 Mo. 201; *Phoenix v. Gardner*, 13 Minn. 430; *Jones v. Brittan*, 1 Woods, 667.

³ *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138.

⁴ *Bentley v. Phelps*, 2 Woodb. & M. 426; *McIntyre v. Humphreys*, 1 Hoffm. (N. Y.) 426.

⁵ *Todd v. Campbell*, 32 Pa. St. 250.

⁶ *Freytag v. Hoeland*, 23 N. J. Eq. 36. It was admitted that the deed, though absolute on its face, was given as security only, and therefore a mortgage. The plaintiff, who sought to recover the property, claimed that it was security for \$700 only; the defendant claimed that it was security not only for that sum but for previous advances of about \$5,300. The plaintiff denied that these advances were made to him or on his credit; and said that the advances were made to his wife and daughter for a different consideration.

The circumstances of the case, in the

language of the chancellor, are "novel and peculiar."

Hoeland was a butcher, and followed his trade at Newark; and afterwards in California and Nevada. He also speculated in mining rights in the latter states. He prospered and had money.

Freytag was a carpenter; he worked at his trade in Newark, where Hoeland boarded for a time in his family. At this time either Mrs. Freytag proposed to Hoeland, or Hoeland proposed to Mrs. Freytag, to clope together. Each said the offer came from the other, and it was virtuously rejected by the party testifying. The result was that Hoeland changed his boarding place, and Mr. Freytag in an encounter with him got a wound over his eye, the scar of which he still bore. But notwithstanding these inharmonious circumstances Hoeland was again received as a boarder by Mrs. Freytag, with whom he was on very friendly and confidential terms.

Katinka, the daughter of the Freytags, was growing up towards womanhood and Hoeland took a fancy to her, and proposed to make her his wife when the proper time should arrive. In this he had the support of the mother. Katinka submitted passively, though it did not appear that she

336. Grantor redeeming must comply with his agreement. — On the principle that “he who seeks equity must do equity,” a grantor who seeks to redeem land from a conveyance made to secure the performance of a verbal agreement to pay a certain sum of money in gold coin should be held to a full compliance with the terms of his agreement, as a condition precedent to a reconveyance.¹ On this ground it has been held, that although a loan upon land has been put in the form of an absolute deed and an agreement to reconvey for the purpose of covering up a contract for usurious interest, the mortgagor is not entitled to the statutory penalties or forfeitures for usury, but must pay on redeeming the amount of the original loan, with legal interest.²

Equity will not relieve a grantor on his own application from the consequences of an absolute deed, made to protect his property from his creditors.³

337. A judgment creditor may show the character of his

ever engaged herself to him. Freytag was an easy-going, submissive man, who did not get on in the world.

Katinka had some talent for music, and took lessons to fit her for taking part in concerts and the opera. Hoeland, at the solicitation of the mother and daughter, furnished them with money. In 1868, the Freytags went to Europe; Freytag returned, but the mother and daughter went to Milan and remained for Katinka's musical education. There Hoeland sent money to them, at the earnest request of the daughter, who in one of her letters almost promised to come back to him at San Francisco. The correspondence and all the arrangements were conducted without consulting Freytag.

“It would not be strange if a young woman of promise, however humble her origin, who had taken lessons of masters of music, especially in Italy, where the art has reached its highest cultivation, should show some reluctance to fulfil an engagement made for her in childhood, and marry a practical butcher far older than herself, and live with him in Nevada or California. Some indications of this feel-

ing, or perhaps a conclusion that mother and daughter had been using his attachment and hopes to obtain his money without any regard to fulfilling his expectation, seems to have aroused Hoeland to his situation, and to have changed his course regarding them.”

In the summer of 1869, Hoeland was in Jersey City; Freytag saw him, and being pressed for money, applied to him for a loan, which was at first refused. Afterwards he consented to advance \$700, on receiving an absolute conveyance of a house and lot subject to a mortgage of \$8,000, but worth twice that sum; and such was the arrangement made. Hoeland claimed that the conveyance secured the advances to the mother and daughter, who were still in Europe. The Chancellor held that the burden was upon the grantee to show that more than the \$700 was secured; and that there was no proof that any further sum was secured.

¹ *Cowing v. Rogers*, 34 Cal. 648.

² *Heacock v. Swartwout*, 28 Ill. 291.

³ See § 283; *Arnold v. Mattison*, 3 Rich. (S. C.) Eq. 153; *Hassam v. Barrett*, 115 Mass. 256.

debtor's conveyance. — A judgment creditor, who has purchased his debtor's land at a sale under execution issued upon his judgment, may show that an absolute conveyance of the land made by his debtor was in fact a mortgage, and he is entitled to a conveyance of it upon paying any balance due upon the mortgage.¹ And without having made a purchase upon execution, a creditor of the grantor may show that such absolute deed is really a mortgage, and may enforce a judgment against the property or the proceeds of it to the extent of the surplus, after satisfying the debt for the security of which it was conveyed.² A judgment obtained against the grantor by a creditor, after the making of an absolute deed, which is really a mortgage, becomes a lien upon the equity of redemption, just as it would if a formal mortgage had been given.³

338. Election to treat the conveyance as absolute. — A mortgagor who abandons his right to redeem from an absolute conveyance, and elects to treat the conveyance as an absolute deed instead of a mortgage, is bound by such election, and cannot afterwards redeem.⁴ He may also verbally waive his right of redemption in favor of another person, and after a long acquiescence in the transaction, the other in the mean time having redeemed the land and improved it, he will not be allowed to redeem from him.⁵

339. As to third persons the grantee is absolute owner. — The grantee of the legal title, whether the transaction be a mortgage or a conditional sale, may exercise all the rights of an absolute owner as to third parties.⁶ The grantor, in order to main-

¹ *Judge v. Reese*, 24 N. J. Eq. 387; *Clark v. Condit*, 17 Ib. 358; *Vandegrift v. Herbert*, Ib. 466; *Van Buren v. Olmstead*, 5 Paige (N. Y.), 9.

² *Allen v. Kemp*, 29 Iowa, 452; *De Wolf v. Strader*, 26 Ill. 225; *Dwen v. Blake*, 44 Ill. 135.

³ *Christie v. Hale*, 46 Ill. 117.

⁴ *Maxfield v. Patchen*, 29 Ill. 42.

⁵ *Carpenter v. Carpenter*, 70 Ill. 457. The plaintiff in this case having been unsuccessful in a love matter with a girl in the neighborhood, started for California,

and, when he reached Chicago, on the road, he wrote to his father to redeem the land and it should be his; that he would never return from California until he was able to set his heel upon the neck of the Gnil tribe (relatives of the girl). The father redeemed the land, sold, it and invested the proceeds in other land. It was held that the father was not liable to account, especially after a lapse of eighteen years unexplained.

⁶ See *Fiedler v. Darrin*, 59 Barb. 651; *McCarthy v. McCarthy*, 36 Conn. 177.

tain an action for rent, cannot show that his deed was intended as a mortgage, and that he is entitled to the position and rights of a mortgagor in possession.¹

A purchaser who has knowledge that his grantor, though holding the estate by an absolute conveyance, nevertheless is, in fact, only a mortgagee, acquires a defeasible estate only, and it is defeasible upon the same terms as it was in the hands of the original grantee.² A mortgage was made of certain mills to secure the sum of \$4,000; and the mortgagor also conveyed to the mortgagee other land absolutely, as security for a further sum of \$6,000. The mortgagee assigned the mortgage, and conveyed the land to a third person, who had notice of the character of the prior conveyance. This assignee foreclosed the mortgage upon the mills, and purchased them upon the sale. He then mortgaged the mills and the other lands to the former mortgagee; and it was held that this mortgage was a lien upon the other lands only to the extent of the original loan upon them of \$6,000, upon the payment of which sum the original owner was entitled to redeem.³

340. Once a mortgage always a mortgage. — If originally taken as a mortgage, nothing but a subsequent agreement of the parties can change its character, and deprive the mortgagor of his right of redemption; and even such an agreement cannot change its character as to intervening interests.⁴ The maxim, "Once a mortgage always a mortgage," applies to such a deed; and if a purchaser take a conveyance from the grantee, with a knowledge that the grantor claims an interest in the property, he takes it charged with the same equities with which it was charged in the hands of the mortgagee.⁵

341. Grantee's liability for mortgaged land sold by him. — Although a grantee in an absolute deed, intended as a mortgage,

¹ *Abbott v. Hanson*, 24 N. J. L. (4 Zab.) *v. Poolman*, 3 Daly (N. Y.), 236; *Clark v. Henry*, 2 Cow. (N. Y.) 324; S. C. 7

² *Houser v. Lamont*, 55 Pa. St. 311, Johns. Ch. 40; *Palmer v. Gurusey*, 7 Wend. (N. Y.) 248; *Cooper v. Whitney*, 3 Hill (N. Y.), 95; *Marks v. Pell*, 1 Johns.

³ *Williams v. Thorn*, 11 Paige (N. Y.), 459; (N. Y.) Ch. 594; *Williams v. Thorn*, 11 Paige (N. Y.), 459; *Parsons v. Mumford*,

⁴ *Elliott v. Wood*, 53 Barb. (N. Y.) 285; 3 Barb. (N. Y.) Ch. 152.
⁵ *French v. Burns*, 35 Conn. 359.

has the power to convey it by a good indefeasible title to a purchaser without notice, yet he is liable to the mortgagor for the value of the land so conveyed; and he cannot defend an action to recover such value by showing that the mortgagor's title was invalid, and that the legal title has since been bought in by the purchaser. The imperfection of the title did not justify his placing it beyond the reach of the mortgagor. It is the duty of the mortgagee upon receiving payment to restore the land, without regard to the condition of the title, in no worse condition, so far as his own acts could affect it, than it was when he received it. But in estimating the value of the land sold, the sum paid for an outstanding title, although paid by the purchaser and not by the mortgagee, may be deducted from the value of the land.¹ The grantee in an absolute deed by way of mortgage, who has sold the land, is liable for the proceeds of the sale, deducting the amount due him and a reasonable compensation for effecting the sale.²

When the grantee has wrongfully conveyed the property, the grantor may at his election claim the proceeds of the sale;³ or the value of the land at the time when the debtor's right to have it restored to him is established.⁴

342. A bill in equity may be maintained to redeem, as from a mortgage, land which the defendant holds by deed from the plaintiff upon evidence that the deed, though absolute in form, was really taken as security for a loan. The decree is for a reconveyance of the land upon the payment of the amount which may be found due the grantee, or upon compliance with such terms as the court may impose.⁵

¹ *Adkins v. Lewis*, 5 Oregon, 292.

² *Van Dusen v. Worrell*, 4 Abb. (N. Y.) App. Dec. 473. In an action for money had and received: *Jackson v. Stevens*, 108 Mass. 94; *Hiester v. Maderia*, 3 Watts &

S. (Pa.) 384; *Barkelaw v. Taylor*, 8 N. J. Eq. (4 Halst.) 206.

³ *Meehan v. Forrester*, 52 N. Y. 277.

⁴ *Enos v. Sutherland*, 11 Mich. 538.

⁵ *Campbell v. Dearborn*, 109 Mass. 130; *McDonough v. Squire*, 111 Mass. 217.

CHAPTER IX.

THE DEBT SECURED.

1. *Description of the Debt.*

343. A general description of the debt sufficient.¹—It is not essential that the mortgage itself should contain a description of the debt intended to be secured. The nature and amount of the indebtedness secured may be expressed in terms so general that subsequent purchasers and attaching creditors must look beyond the deed, to ascertain both the existence and amount of the debt. It is even held that a deed absolute in form, if in fact intended by the parties as a security for subsequent advances or liabilities to be assumed by the grantee in the grantor's behalf,² is a valid security against judgment or execution creditors, or other incumbrancers, although such intention does not appear upon the deed, or by any evidence in writing.

All the description required to be made of the debt is a general one, which will put those interested upon inquiry.³ A condition to pay the mortgagee "what I may owe him on book" was held to cover not only the present but the future indebtedness of the mortgagor, at least until the mortgagee should receive express notice of subsequent incumbrances or interests, and he is not bound to watch the registry for subsequent conveyances. And so a mortgage to secure the payment of \$1,500, which the mortgagor owed on book account, and by several notes, without specifying the amount or date of any particular note, sufficiently describes the debt.⁴ A mortgage to secure a claim on book account, for goods sold and delivered, in about the sum of \$5,000, is sufficient

¹ See § 70.

² *Gibson v. Seymour*, 4 Vt. 518, approved in *Seymour v. Darrow*, 31 Vt. 122.

³ *McDaniels v. Colvin*, 16 Vt. 300; *Hurd v. Robinson*, 11 Ohio St. 232.

⁴ *Merrills v. Swift*, 18 Conn. 257. See, also, *Shirras v. Caig*, 7 Cranch, 34; *Truscott v. King*, 6 Barb. (N. Y.) 346; *Stuyvesant v. Hall*, 2 Barb. (N. Y.) Ch. 151.

to secure the mortgagee's actual claim not exceeding that sum.¹ And when the mortgagor made a mortgage conditioned to pay the mortgagee "all the notes and agreements I now owe or have with him," the mortgagee was permitted to hold the security for payments made as an indorser for the mortgagor under an existing agreement.² A condition to pay "all sums that the mortgagee may become liable to pay by signing or otherwise" is not too indefinite, and includes any legal liability he may incur for the mortgagor.³

344. The amount of an ascertained debt should be stated. When the mortgage is given to secure future advances, it is of course not practicable to state in the mortgage itself anything more than a limit to which such advances may reach; and such a limit is required by some courts, though it is generally held to be sufficient that the mortgage sets forth the foundation of such liability, or such data, as will put any one interested upon the track to find out the extent of the liability. Moreover, when the mortgage is given to secure a debt, the amount of which is not ascertained, it is sufficient if the mortgage contains such facts about it as will lead an interested party to ascertain the real state of the incumbrance. But if the mortgage is given to secure an ascertained debt, the amount of that debt ought to be stated; and accordingly it has been held that a mortgage given to secure an existing debt of a fixed amount, but which is described in the condition of the mortgage only as a note due from the mortgagor to the mortgagee, of a certain date payable on demand with interest, without specifying the amount, is not a valid security against subsequent incumbrances.⁴ This is required not by any

¹ *Lewis v. De Forest*, 20 Conn. 427.

² *Seymour v. Darrow*, 31 Vt. 122.

³ *Soule v. Albee*, 31 Vt. 142.

⁴ *Hart v. Chalker*, 14 Conn. 77. Chief Justice Williams, delivering the opinion of the court, said: "Whether this omission was owing to design or accident, we are not informed. In either case the effect would be the same; and the public would not have that information which it was intended should be given, and which, if generally neglected, would make our records of little value. Indeed, if such a general description is good, it would seem

as if it were enough to say, 'This mortgage is intended to secure any debt due;' for there would be little more danger, in that case, of substituting fictitious debts, than in this where the sum is omitted; for he who would substitute fictitious debts under that general description, would have very little additional restraint from the fact that the date and time were given. It is said that there is enough to put a person on inquiry, and that is all a court of equity requires. That principle, however, we do not think is applicable to cases of this class, where there is a certain known

specific provision of the registry law ; but the spirit of the system requires that the record should disclose, with as much certainty as the nature of the case will admit of, the real state of the incumbrance.

The cases, however, which require this degree of strictness in describing the indebtedness, are not supported by the weight of authority.¹ It is generally held to be sufficient if it appear that a debt is secured, and that the amount of it may be ascertained by reference to other instruments, or by inquiry otherwise. Accordingly it is held, contrary to the decisions above noticed, that a reference in a mortgage to a note or bond secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry as to the contents of the note or bond, and to charge them with notice to the same extent as if the amount and terms of the note or bond had been fully set forth.² It is not even necessary that the amount of the note should be specified in the mortgage, when it is otherwise described.³

345. The debt must come fairly within the terms used. — A mortgage, to secure all the debts due from the grantor to the grantee, and all liabilities of the latter as surety for the former, is

debt. If it is to be adopted as a general rule, it would overturn all the cases in which this court have held that the description was too indefinite." The cases cited by the Chief Justice in this connection are : *Pettibone v. Griswold*, 4 Conn. 158, 162; *Crane v. Deming*, 7 Ib. 388, 395; *Booth v. Barnum*, 9 Ib. 286, 290; *Bolles v. Chauncey*, 8 Ib. 390. See, also, *St. John v. Camp*, 17 Conn. 222, 230; *Metropolitan Bank v. Godfrey*, 23 Ill. 579, 604.

A similar decision was made in a recent case in Kentucky. *Pearce v. Hall*, 12 Bush, 209. The condition was for the payment of a note fully described, with the exception that the amount was not set out, nor was there anything in the conveyance from which any inference whatever as to the amount could be drawn. It was held, that a subsequent attaching creditor had precedence. Mr. Justice Lindsay said : " We are satisfied that a mortgage, to be good against a purchaser for a valuable consid-

eration, or a creditor, must not only be lodged for record in the proper office, but must, as far as is reasonably practicable, set out the amount of the debt for the payment of which the parties intend it as a security. We do not mean to intimate that an omission to state the date of the note, or the time at which it will fall due, or the precise amount of the debt, even when the amount is ascertained, is essential to make the mortgage valid ; but to hold the omission in this case immaterial would be in effect to say that a mortgage need only show that the mortgagor is indebted to the mortgagee, and that purchasers and creditors must, upon that recital, ascertain for themselves, as best they can, the amount of the indebtedness."

¹ The earlier cases in Connecticut are not supported by the later decisions in that state.

² *Pike v. Collins*, 33 Me. 38.

³ *Somersworth Sav. Bk. v. Roberts*, 38 N. H. 22.

valid without a more particular description.¹ But when it is attempted to describe the debts secured to entitle a debt to the benefit of the security, it must come fairly within the terms used in the mortgage. A mortgage which correctly described other debts, and then mentioned "a note or notes for about \$350" was held not to include six notes amounting to over \$1,500.² In like manner, a mortgage securing "an account for about \$50," does not include accounts exceeding \$900.³ A mortgage to secure a gross sum, which the mortgagee was at liberty to furnish in materials toward the erection of a house for the mortgagor, does not cover a collateral liability assumed by the mortgagee as surety or guarantor for the mortgagor.⁴

346. A mortgage to secure an unliquidated debt, as for instance an open book account, is good.⁵ So is a mortgage by a trustee to secure the payment of the moneys in his hands belonging to the trust estate, the amount of which is then unascertained. So is a mortgage to secure the fidelity of an agent or factor;⁶ or a mortgage to secure any balance that may remain after application to the debt of moneys that may be collected upon other securities held by the creditor.⁷ A description of a debt secured by the mortgage as a certain sum, "or thereabout," is sufficient to put a person upon inquiry as to the amount of the incumbrance, and the mortgage is good for a sum not very materially larger than that mentioned.⁸

Although a mortgage be given for a definite sum, it is competent to prove by parol that it was given to secure an open account, the balance of which is continually varying.⁹ A mortgage to secure future and contingent debts is good against a prior unregistered mortgage.¹⁰

If a mortgage be given to secure an unliquidated debt or an unadjusted account, or balance of account, the burden is upon the

¹ *Vanmeter v. Vanmeter*, 3 Gratt. (Va.) 148; *Michigan Ins. Co. v. Brown*, 11 Mich. 265.

² *Storms v. Storms*, 3 Bush (Ky.), 77.

³ *Storms v. Storms*, *supra*.

⁴ *Doyle v. White*, 26 Me. 341.

⁵ In New Hampshire, where a statute requires that the debt shall be expressed in the mortgage, it cannot be made to

cover unliquidated damages. *Bethlehem v. Annis*, 40 N. H. 34.

⁶ *Stoughton v. Paseo*, 5 Conn. 442.

⁷ *Clarke v. Baneroft*, 13 Iowa, 320.

⁸ *Booth v. Barnum*, 9 Conn. 286.

⁹ *Esterly v. Purdy*, 50 How. (N. Y.) Pr. 350.

¹⁰ *Moore v. Ragland*, 74 N. C. 343.

holder of it to produce the accounts and prove what is due.¹ A sum to be ascertained by an award may be secured by mortgage. But where it was provided that the referees, taking certain data stated in the mortgage as their rule or guide, should make their award and return it in writing to the parties within thirty days after their appointment, the award having failed by reason of the misconduct of the arbitrators, it was held that the mortgage was security for the amount of an award to be made in this manner, and that the mortgagees could not have relief in equity upon a bill for a sale of the mortgaged property.²

347. Antecedent debt. — Whether a mortgage given to secure an antecedent debt entitles the mortgagee to the position of a purchaser for value is a question elsewhere considered,³ upon which the adjudications are not in harmony. A recital in the mortgage that the mortgagor is indebted to the mortgagee in a certain sum, for which “he has given his checks,” does not imply that the mortgage was given for an antecedent debt.⁴

348. A mortgage given as security for a larger indebtedness. — A mortgage was given to secure the sum of \$3,000, when the mortgagor was indebted to the mortgagee in the sum of \$10,000 and upwards, being the balance of an account current between them; and it was objected that the mortgagee could not, under the recording system, be allowed to take a mortgage to secure a part of the debt, and hold it as a valid security on the property until the whole debt is paid. The objection was not to any uncertainty in the debt intended to be secured, but rather to the application of subsequent payments made by the debtor, without any specific direction at the time as to their application. But it was held that the payments were properly applicable to the unsecured part of the debt, and that the mortgage remained a valid security for the remainder of the debt.⁵ Though given for a greater sum than the amount due, the mortgage, in the absence of any fraudulent intent, is valid to that extent.⁶

¹ *De Mott v. Benson*, 4 Edw. Ch. 297.

⁵ *Chester v. Wheelwright*, 15 Conn.

² *Emery v. Owings*, 7 Gill (Md.), 488. 562.

³ See chapter xi. on “REGISTRATION.”

⁶ *Gordon v. Preston*, 1 Watts (Pa.),

⁴ *Winchester v. Baltimore, &c. R. Co.* 385.

4 Md. 231.

349. Description of note.¹—It is not necessary that the mortgage should describe the note secured with the utmost particularity, but only so that it may be reasonably identified. The omission in the mortgage of the words “or order,” in describing a note payable to the mortgagee or order, is not such a variance as to render the note inadmissible in evidence.² A mortgage conditioned to pay a note in the penal sum of \$787, when in fact the note was without penalty, is not invalid for the want of reasonable certainty. The whole sum of the penalty may be due, and no one could be misled except through his own negligence to make inquiry as to the amount due.³ A condition that the mortgage shall be void upon the payment of the notes described in a certain other mortgage referred to by date and record in another county of the state, sufficiently indicates the amount secured and is valid.⁴

A mortgage conditioned to pay whatever sum the mortgagor might owe the mortgagee, either as maker or indorser of any notes or bills, bonds, checks, over-drafts, or securities of any kind given by him, according to the conditions of any such writings obligatory, executed by him to the mortgagees as collateral security, was held to secure only such debts as were evidenced by writing.⁵

The recitals in a mortgage are competent evidence against the mortgagor, to prove the consideration of the note described in it.⁶ It will be presumed that a “note,” referred to in a mortgage or deed of trust, is not under seal.⁷

350. It is not necessary that all the particulars of the note or other obligation secured by a mortgage should be specified in the conditions of it, in order to identify it as the note intended to be secured. If the paper offered in evidence agrees with the description contained in the mortgage so far as that goes, only that this description is not complete, the possession and production of the instrument is *primâ facie* evidence that it is the same mentioned in the condition. If, however, the description in the condition varies from the paper offered in evidence in certain par-

¹ See § 71.⁶ Warner v. Brooks, 14 Gray (Mass.), 107.² Hough v. Bailey, 32 Conn. 288.³ Frink v. Branch, 16 Conn. 260.⁷ Jackson v. Sackett, 7 Wend. (N. Y.)⁴ Kellogg v. Frazier, 40 Iowa, 502.

94; Walker v. McConnico, 10 Yerg.

⁵ Walker v. Paine, 31 Barb. (N. Y.) (Tenn.) 228.

ticulars, then the mere possession of it might not furnish even *prima facie* evidence that it is the obligation intended to be secured.¹ It is only necessary that the mortgage should state correctly sufficient facts to identify the paper with reasonable certainty; and then if some particulars of the description do not correspond precisely with the instrument produced it is not material. This is illustrated by the case of a mortgage to secure "a certain promissory note made and delivered on or about the eighth day of August, 1867 . . . payable on or about one year from date, to the N. W. U. P. Company," signed by three persons, for a sum named. In a foreclosure suit, the note produced was dated August 6, 1867, payable on or before September 1, 1868, to the Northwestern Union Packet Company, at the National Bank of La Crosse, and was for the same sum and signed by the same persons named in the mortgage; but there was a condition inserted that it might be paid by the delivery of a barge in lieu of money. The note was admitted in evidence as sufficiently identified by the description in the mortgage.²

But when a note agrees in some respects with the description, though it varies in others, it may be proved by parol to be the one intended in the mortgage. If, however, the note produced be totally variant from that described in the mortgage, such evidence is inadmissible in an action at law.³

It is no objection to the validity of a mortgage that it does not state the names of the holders of the notes secured, when they are otherwise identified; and such a mortgage when duly recorded is notice to subsequent purchasers of the property of the existence of the notes intended to be secured, and they are bound by the legal effect of the incumbrance.⁴ A mortgage for the payment of debt, according to the condition of a bond recited in the mortgage, will not be avoided in equity for the reason that the day of payment of the bond has already passed. At law the condition being impossible, the deed would be regarded as absolute; but in equity it is a security merely like an ordinary mortgage.⁵

When a mortgage was conditioned for the payment of a sum of

¹ Robertson v. Stark, 15 N. H. 112.

² Paine v. Benton, 32 Wis. 491; and see Williams v. Hilton, 35 Me. 547; Partridge v. Swazey, 46 Me. 414; Johns v. Church, 12 Pick. (Mass.) 557; Boody v. Davis, 20 N. H. 140; McKinster v. Bab-

cock, 26 N. Y. 378; Hurd v. Robinson, 11 Ohio St. 232; Paine v. Benton, 32 Wis. 491.

³ Follett v. Heath, 15 Wis. 601.

⁴ Boyd v. Parker, 43 Md. 182.

⁵ Hughes v. Edwards, 9 Wheat. 489.

money on a day named, the year being left blank, according to the tenor of a promissory note for the same sum, and the note was never made, and only a small part of the money loaned, for which a receipt was given, it was considered that the bargain was incomplete, and the mortgage of no effect. It was considered as never having been executed and delivered for the purpose of having effect according to its tenor.¹

It is not necessary that the mortgage should set forth a literal copy of the note secured by it. It is sufficient to describe its legal effect.²

351. The notes referred to are evidence of the amount of the debt. — When there is any uncertainty as to the amount secured by the mortgage, the notes referred to in it are competent evidence to explain the language as against the mortgagor, or one who purchased the equity of redemption, with notice of the notes intended to be secured; as when the mortgage described the debt as “two promissory notes, bearing even date herewith, for the sum of five hundred dollars, one payable in 1852, and the other in 1853,” and the notes were for five hundred dollars each. Such evidence is not contradictory to the language of the mortgage, but explanatory.³ Where a mortgage described a bond secured by it as of a certain sum, a bond for a smaller sum, and dated one day later, may be shown in evidence to have been substituted for the bond described, and in an action to foreclose, a conditional judgment may be rendered for the amount of such substituted bond.⁴

352. Parol evidence is admissible to identify the note, and show that the note produced is the one referred to in the mortgage.⁵ Such evidence has been admitted to show that a mortgage made to Ebenezer Hall 3d, conditioned for the payment of a note of the same date, in fact secured a note to Ebenezer Hall, which was dated several months earlier.⁶ In the same case a further discrepancy of one thousand years in the date of the note was considered so palpably a mere clerical mistake that no explanation of

¹ *Parker v. Parker*, 17 Mass. 370.

² *Aull v. Lee*, 61 Mo. 160.

³ *Crafts v. Crafts*, 13 Gray (Mass.), 360.

⁴ *Baxter v. McIntire*, 13 Gray (Mass.), 168.

⁵ *Aull v. Lee*, 61 Mo. 160; *Doe v. Mc-*

Loskey, 1 Ala. 708; *Bell v. Fleming*, 1

Beas. (N. J.) 13; *Jackson v. Bowen*, 7

Cow. (N. Y.) 13; *Johns v. Church*, 12

Pick. (Mass.) 557; *Goddard v. Sawyer*, 9

Allen (Mass.), 78.

⁶ *Hall v. Tufts*, 18 Pick. (Mass.) 455.

it was required. In general it may be said that a mortgage is not invalid either between the parties, or as to third persons, on account of uncertainty in the description of the debt, when upon the ordinary principle of allowing extrinsic evidence to apply a written contract to its proper subject matter, the debt intended to be secured can be shown.¹ Very considerable latitude has been allowed in admitting evidence to show that securities offered at the trial of an action to foreclose a mortgage are really substitutes for those described in it; and they have been held to be secured by it, although not corresponding in any particular with those described in the mortgage.²

A mortgage which recited that it was given to secure the payment of a note described, "and also in consideration of the further sum of \$500," paid to the mortgagor, was held to be security for the sum of \$500 in addition to the note. Parol evidence of this further indebtedness of \$500 was allowed, as not enlarging the terms of the mortgage, but simply showing the true amount. A mortgage conditioned to pay a certain sum, and also to secure a bond, the condition of which covers all liabilities of the debtor to the mortgagee, is construed to cover all indebtedness under the bond, the amount and nature of which may be shown by parol.³

353. A deed of trust or mortgage is valid without any note or bond,⁴ although it purports to secure a note or bond, and substantially describes it. The mortgage debt exists independently of the note. The inquiry is, does the debt exist? If it does, it is not essential that there should be any evidence of it beyond what is furnished by the recitals of the deed.⁵ The validity of a mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond or otherwise; it depends rather upon the existence of the debt it is given to secure.⁶ Although

¹ *Gill v. Pinney*, 12 Ohio St. 38; *Tousley v. Tousley*, 5 Ib. 78; *Hurd v. Robinson*, 11 Ib. 232.

² *Baxter v. McIntire*, 13 Gray (Mass.), 168, per Dewey, J.

³ *Babcock v. Lisk*, 57 Ill. 327; *N. H. v. Willard*, 10 N. H. 210.

⁴ *Smith v. People's Bank*, 24 Me. 185; *Mitchell v. Burnham*, 44 Me. 286.

⁵ *Eacho v. Cosby*, 26 Gratt. (Va.) 112; and see *Flagg v. Mann*, 2 Sum. 486, 534; *Goodhue v. Berrien*, 2 Sandf. (N. Y.) Ch. 630; *Burger v. Hughes*, 5 Hun (N. Y.), 180.

⁶ *Hodgdon v. Shannon*, 44 N. H. 572; *Griffin v. Cranston*, 1 Bosw. (N. Y.) 281; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Farmers' Loan & Trust Co v. Curtis*, 7

there be no note or bond, and no time is specified for the payment of the mortgage debt, the mortgage, if given to secure a debt that actually exists, is valid, and may be enforced immediately.¹

354. Mistakes in describing the debt. — The lien of a mortgage is not affected by a clerical inaccuracy in the description of the debt; as for instance in the date of the note secured, or in time of its payment.² The amount of the bond secured by a mortgage having been left blank, and the mortgage having been recorded without the blank being filled, the mortgagor afterwards executed a writing under seal, stating that the sum, two thousand dollars, was omitted and should have been inserted, and this writing was attached to the page on which the registry was made. This was held to be a sufficient record as against a subsequent mortgage.³ A mistake in describing the mortgage note does not ordinarily invalidate the security.⁴

355. The renewal of the original note of the mortgagor does not affect the security.⁵ — But a mortgage given to secure the payment at maturity, of the notes of another, does not secure renewal notes substituted in place of them. The mortgagor stands in the relation of surety for the debtor, and his obligation cannot be continued without his consent.⁶

It is questioned whether a mortgage can be modified by substituting for a part of the bond secured by it a due bill payable at a different time, and to a different person; it certainly cannot be so changed and the security transferred to the due bill, except upon a clear showing that such was the agreement when the exchange was made.⁷ An agreement that a promissory note shall be substituted for notes of a larger amount already secured by a mortgage, and if paid at maturity shall be considered a payment and discharge *pro tanto* of those notes and of the mortgage, and that the mortgage shall be held as collateral security for the new note, and not be discharged or cancelled until that is paid, does

N. Y. 466; *Contant v. Servoss*, 3 Barb. (N. Y.) 128.

¹ *Brookings v. White*, 49 Me. 479; *Camall v. Duval*, 22 Ark. 136.

² *Tousley v. Tousley*, 5 Ohio St. 78.

³ *Lambert v. Hall*, 7 N. J. Eq. (3 Halst.) 410, 651.

⁴ *Porter v. Smith*, 13 Vt. 492.

⁵ See chapter xxi. on "PAYMENT;" *Williams v. Starr*, 5 Wis. 534; *Bank of S. C. v. Rose*, 1 Strobb. (S. C.) Eq. 257; *Enston v. Friday*, 2 Rich. (S. C.) 427.

⁶ *Ayres v. Wattson*, 57 Pa. St. 360.

⁷ *Tucker v. Alger*, 30 Mich. 67.

not create a lien upon the mortgaged property to secure its payment. The note is not given in renewal or consolidation of the mortgage notes, or any of them. The relation of the parties is not changed. No new right in the mortgaged property is given, and no new lien is created.¹

356. Several mortgages securing one debt.²—When several mortgages are made of distinct parcels of land, and each is conditioned for the payment of the whole debt, they constitute in effect one mortgage, and their unity is determined by the debt secured.³ Parol evidence is admissible for this purpose, and whether the debt be described in the same way in the different mortgages or not, it may be shown that they are only additional security for the same debt.⁴ A mortgage given to secure separate debts to several persons is several in its nature, as much as if several instruments had been simultaneously executed.⁵

357. Enlarging the terms of the mortgage.—If a mortgage secure a specific sum, the parties cannot by parol agreement, as against others who have acquired rights in the property, extend the mortgage to cover other debts, or further advances.⁶ Neither can the mortgagor as against them increase the charge upon the land by confessing judgment, and thus compounding the interest.⁷ The mortgage being given to secure a certain debt is valid for that purpose only; but whatever form the debt may assume, so long as it can be traced, the security remains good for that.⁸

As against the mortgagor, his agreement that the mortgage shall stand as security to the mortgagee for further advancements,

¹ *Howe v. Wilder*, 11 Gray (Mass.), 267.

This agreement was regarded the same as if the mortgagee had said, "Give me your note for \$600; if paid, I will indorse it on the mortgages; if not, the mortgages are to stand as they are."

² See § 135.

³ *Franklin v. Gorham*, 2 Day (Conn.), 143.

⁴ *Anderson v. Davies*, 6 Munf. (Va.) 484.

⁵ *Gardner v. Diederichs*, 41 Ill. 158; *Thayer v. Campbell*, 9 Mo. 280; *Burnett*

v. Pratt, 22 Pick. (Mass.) 556; *Eccleston v. Clipsham*, 1 Saund. 153.

⁶ *Stoddard v. Hart*, 23 N. Y. 556; *Townsend v. Empire Stone Dressing Co.* 6 Duer (N. Y.), 208, and cases cited; *Large v. Van Doren*, 14 N. J. Eq. 208. See *Beekman F. Ins. Co. v. First M. E. Church*, 29 Barb. (N. Y.) 658; 18 How. Pr. 431.

⁷ *McGready v. McGready*, 17 Mo. 597.

⁸ *Patterson v. Johnston*, 7 Ohio, 225; *Van Wagner v. Van Wagner*, 7 N. J. Eq. (3 Halst.) 27.

although it be oral only, is valid, and after the advances have been made upon the faith of it, a court of equity will not allow the mortgagor to redeem without performing it. It will apply to him the maxim, that he who seeks equity must do equity. It will also apply the same rule to any one claiming under him with notice. Therefore, where the assignees in insolvency of the mortgagor have conveyed the equity of redemption to his wife, without consideration and with notice of such agreement, a court of equity will decline to aid her to redeem the mortgage in violation of this contract.¹ So, in answer to a bill in equity by an assignee in bankruptcy to redeem a mortgage, it is competent for the holder of the mortgage to show that the bankrupt had, for a valuable consideration, orally agreed that a mortgage made by him to another person, and paid in large part, should not be discharged, but should be assigned to the creditor as security for further loans and debts. Such oral agreement could not be set up against a subsequent mortgagee, or against an attaching creditor; nor could it be set up against the mortgagor or his assignee in a suit at law, but it may be in equity.²

But in Pennsylvania the courts say they will not tolerate an oral mortgage or secret lien; and therefore where the mortgage has been given by tenants in common, to secure a partnership debt, the mortgage cannot after payment be kept alive as security for an individual debt of one of them to the mortgagee, even as against his interest.³

When a mortgage is made to secure a certain sum of money, and afterwards an additional provision is made but not recorded, that this sum shall be paid in gold, it *can* be enforced by a sale for gold as against subsequent incumbrancers whose lien attached after this addition was made.⁴

358. Taxes and assessments.⁵ — There is an apparent exception to the rule that the mortgage debt cannot, as against third persons, be increased after the execution of the mortgage; and

¹ *Stone v. Lane*, 10 Allen (Mass.), 74; reversing 3 Phila. 62; S. C. under name and see *Joslyn v. Wyman*, 5 Allen (Mass.), 62; *Crafts v. Crafts*, 13 Gray (Mass.), 360.

² *Upton v. Nl. Bank of South Reading*, 120 Mass. 153.

³ *Thomas's Appeal*, 30 Pa. St. 378,

⁴ See *Poett v. Stearns*, 31 Cal. 78.

⁵ See § 77.

that is, that money paid by the mortgagee, to redeem the premises from a tax sale, or from any charge which is a paramount lien upon the property, becomes a part of the mortgage debt, and may be enforced by foreclosure.¹ The mortgage is usually so drawn that in terms it includes under the security any payments that have been made by the mortgagee in consequence of any default of the mortgagor. But without any such provision, the payment by the mortgagee of charges which are a prior lien, and the removal of which is essential to his own protection and safety, gives him in equity not only a right to retain the amount paid out of the proceeds of the land when sold upon foreclosure, as against the mortgagor,² but also preference by way of subrogation to other incumbrances, even though they are prior to him, but whose liens have been protected by such payment.³

359. Solicitor's fee. — In addition to the mortgage debt, the mortgage may be made to secure the payment of a reasonable solicitor's fee, in case of a foreclosure of the mortgage.⁴ The amount of such fee may be specified in the mortgage, or left to the discretion of the court. The stipulation may be enforced as well against subsequent purchasers and incumbrancers as against the mortgagor himself.⁵ Such fee is presumed to be in addition to the taxable costs allowed by law.⁶ If it be shown, however, that suit was unnecessary, attorney's fees have been refused, although stipulated for in the mortgage.⁷ Such a stipulation, if not unreasonable in amount, is not regarded as imposing a penalty, but merely as giving compensation to the mortgagee for expenses incurred in consequence of the mortgagor's default.⁸ The lien of the mortgage covers such a provision as much as the debt itself; and it also attaches equally to the costs of suit, and to ex-

¹ *Wright v. Langley*, 36 Ill. 381; *Mix v. Hotchkiss*, 14 Conn. 32; *Hill v. Eldred*, 49 Cal. 399; *Burr v. Veeler*, 3 Wend. (N. Y.) 412; *Faure v. Winans*, Hopk. (N. Y.) Ch. 283; *Kortright v. Cady*, 23 Barb. (N. Y.) 490; 5 Abb. Pr. 358; *Robinson v. Ryan*, 25 N. Y. 320.

² *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. 37; *Rapelye v. Prince*, 4 Hill (N. Y.), 119; *Dale v. McEvers*, 2 Cow. (N. Y.) 118.

³ *Cook v. Kraft*, 3 Lans. (N. Y.) 512.

⁴ See chapter xxxv. "DECREE OF SALE;" *Bronson v. La Crosse R. Co.* 2 Wall. 283; *Rice v. Cribb*, 12 Wis. 179; *Hitchcock v. Merriek*, 15 Wis. 522. See, however, *Sage v. Riggs*, 12 Mich. 313.

⁵ *Pierce v. Kneeland*, 16 Wis. 672.

⁶ *Hitchcock v. Merriek*, 15 Wis. 522.

⁷ *Alexandrie v. Saloy*, 14 La. Ann. 327.

⁸ *Robinson v. Loomis*, 51 Pa. St. 78. The stipulation in this case was five per cent.

penses necessarily incurred in enforcing the mortgage, although not specially provided for in the mortgage.¹

360. Tacking other debts.² — The mortgagee cannot tack to his mortgage any debt not secured thereby, and require its payment by the mortgagor as a condition to his right to redeem.³ A mortgage executed to secure the payment of notes of a definite amount cannot, after the payment of the notes, be made available to secure further advances, unless it is so provided in the mortgage, or by a legal contract between the parties.⁴ A verbal agreement is insufficient for that purpose. But when such was the purpose of the mortgage in the beginning, there is no objection that it secures an existing demand and also future advances.⁵

A penalty of twenty per cent. imposed by statute for omitting prompt payment of school money loaned upon mortgage, is not a lien under the mortgage, but is imposed upon the borrower only.⁶ Under a mortgage to a building association, expressly securing only monthly payments, the payment of fines and other dues to the association is not secured.⁷

361. Increasing the rate of interest. — The parties to a mortgage cannot, as against subsequent parties in interest, stipulate by an unrecorded agreement for a higher rate of interest than that provided in the mortgage as recorded, nor can they by such means incorporate into the mortgage any additional indebtedness. A subsequent mortgagee or purchaser has the right to redeem, by paying the amount due according to its terms.⁸

362. Redelivery of mortgage for a new obligation.⁹ — Generally it is held that a mortgage which has been satisfied and delivered up to the mortgagor without being cancelled may be again delivered by him as a valid security, except as against intervening securities. The delivery of the security gave it efficacy in the beginning; and if, after having used it for one purpose, he

¹ *Hurd v. Coleman*, 42 Me. 182.

² See chapter xxii. on "REDEMPTION."

³ *Bacon v. Cottrell*, 13 Minn. 194.

⁴ *Johnson v. Anderson*, 30 Ark. 745.

⁵ *North v. Crowell*, 11 N. H. 251.

⁶ *Bradley v. Snyder*, 14 Ill. 262.

⁷ *Hamilton Building Ass'n v. Reynolds*, 5 Duer (N. Y.), 671.

⁸ *Gardner v. Emerson*, 40 Ill. 296.

⁹ See chapter xxi. on "PAYMENT."

redeliver it for another purpose, the redelivery gives it vitality again.¹

363. A mortgage already recorded may be made to secure a further sum by an indorsement upon the mortgage executed and acknowledged with the usual formalities of a deed, and recorded with a proper reference to the record of the mortgage. This has been done where the mortgage was given to secure an acceptor of drafts, and by such an indorsement it was made to apply in all its provisions and terms as security for other drafts. The record of the indorsement made a valid extension of the condition of the mortgage as first made and recorded to the further liability incurred by the mortgagee.²

2. *Future Advances.*

364. In general. — There has been much diversity of opinion among courts and law writers on the question of the validity of mortgages to secure future advances, and as to the rights of mortgagees under such mortgages against subsequent purchasers and incumbrancers. Although the record must show the existence of the mortgage in order to avail anything as a notice, yet, it is generally conceded that it need not show the exact amount of the incumbrance. But while according to some authorities the limit of these advances should be named, so that an inquirer may know that the incumbrance cannot exceed a certain amount,³ according to others there is no necessity for limiting the amount of the intended advances in any way.⁴ But even where a limitation is necessary in order to constitute a continuing security which will not be affected by subsequent conveyances, a recorded mortgage for an unlimited sum is notice to a subsequent incumbrancer as to all sums advanced upon the mortgage before the subsequent lien attached. Moreover, the record of the subsequent mortgage is no notice to such prior mortgagee that any subsequent lien has attached.⁵ The subsequent mortgagee can limit the credit that may be safely given under the mortgage for future advances

¹ Underhill v. Atwater, 22 N. J. Eq. 13; *Ib.* 490; Beckman v. Frost, 18 Johns. 16, per Zabriskie, Chancellor (N. Y.) 544.

² Choteau v. Thompson, 2 Ohio St. 114. ⁴ Witzcinski v. Everman, 51 Miss. 841.

⁵ See Robinson v. Williams, 22 N. Y.

³ Bell v. Fleming, 12 N. J. Eq. (1 Beas.) 380; and § 372.

only by giving the holder of it express notice of his lien, and a notice also that he must make no further advances on the credit of that mortgage.¹ The mortgage will then stand as security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage or arose afterwards, but prior to the receipt of such notice.² If such mortgagee is not under any obligation to make advances, and after notice of a subsequent mortgage does make further advances, to the extent of such advances the subsequent mortgagee has the right of precedence.³ But if such mortgagee is under obligation to make the advances, he is entitled to the security whatever may be the incumbrances subsequently made upon the property, and whether he has notice of them or not.⁴

365. Mortgages to secure future advances have always been sanctioned by the common law. — An early case is thus stated in Viner's Abridgment: "A. mortgages to B. for a term of years to secure a certain sum of money already lent to the mortgagor, as also such other sums as should thereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lends a further sum. The question was, upon what terms the second mortgagee should be allowed to redeem the first; and Cowper, the Lord Chancellor, held that he should not redeem without paying all that was due, as well the money lent after as that lent before the second mortgage was made; "for it was the folly of the second mortgagee, with notice, to take such a security." ⁵ This case, however, was critically examined by Lord Chancellor Campbell, before the House of Lords in the case of *Hopkinson v. Rolt*,⁶ and he declared the representation made by

¹ *M'Daniels v. Colvin*, 16 Vt. 300; *Ward v. Cooke*, 17 N. J. Eq. 93. See § 371.

² *Ripley v. Harris*, 3 Biss. 199; *Nelson v. Boyce*, 7 J. J. Marsh. (Ky.) 401; *Speer v. Whitfield*, 10 N. J. Eq. (2 Stock.) 107; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Buchanan v. International Bank*, 78 Ill. 500.

³ *Frye v. Bank of Ill.* 11 Ill. 367; *Spader v. Lawler*, 17 Ohio, 371. This decision was based somewhat upon the effect

of the statute of that state relating to mortgages. *Ladue v. Detroit, &c. R. R.* Co. 13 Mich. 380.

⁴ See § 372.

⁵ *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3; 2 Eq. Cas. Abr. 598.

⁶ 9 Ho. of Lords, 514; 7 Jur. N. S. 1209.

The English cases are carefully reviewed. *Rolt v. Hopkinson*, 25 Beav. 461.

the reporters, that the first mortgagee had notice of the second mortgage, to be without foundation. The doctrine supposed to have been laid down in *Gordon v. Graham* is declared unsound, and is overruled; and the doctrine in England is therefore settled, that a first mortgagee cannot claim the benefit of the security for optional advances made by him after notice of a second mortgage upon the property.¹ This question is examined elsewhere;² and these two cases are referred to in this connection as the leading cases in England upon the subject, and as showing that future advances may be secured if the mortgage be properly made for that purpose.³

In this country mortgages made in good faith for the purpose of securing future debts have generally been sustained, both in the early and in the recent cases.⁴ It does not matter that the future advances are to be made to a third person, or for his benefit at the request of the mortgagor.⁵ Neither is the validity of a mortgage to secure future advances affected by the fact that the advances are to be made in materials for building instead of money.⁶

366. Statute requirement that the amount secured shall be stated.—In Maryland it is provided by statute⁷ that no mortgage, or deed in the nature of a mortgage, shall be a lien or charge on any estate or property for any other or different principal sum or sums of money than appear on the face of the mortgage, and are specified and recited in it, and particularly mentioned and expressed to be secured thereby at the time of executing it. This provision is not however applicable to mortgages given to indemnify the mortgagee against loss from being indorser or security.

¹ The opinion of the court was delivered to this effect by Lords Campbell and Chelmsford; but Lord Cranworth gave a dissenting opinion, to the effect that the law was correctly laid down by Lord Cowper, as reported.

² See §§ 368–374.

³ See, also, *Burgess v. Eve*, L. R. 13 Eq. 450; *Daun v. City of London Brewery Company*, L. R. 8 Eq. 155; *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

⁴ *United States v. Hoce*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34; *Leeds v. Cameron*, 3 Sum. 488; *Commercial Bank*

v. Cunningham, 24 Pick. (Mass.) 270; *Goddard v. Sawyer*, 9 Allen (Mass.), 78; *Truscott v. King*, 6 N. Y. 147; *James v. Morey*, 2 Cow. (N. Y.) 292; *Brinkerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 73; *Fassett v. Smith*, 23 N. Y. 252; *Brckett v. Sears*, 15 Mich. 244; *Seaman v. Fleming*, 7 Rich. (S. C.) Eq. 283; *Garber v. Henry*, 6 Watts (Pa.), 57.

⁵ *Maffitt v. Rynd*, 69 Pa. St. 380, and cases cited.

⁶ *Brooks v. Lester*, 36 Md. 65; *Doyle v. White*, 26 Me. 341.

⁷ Pub. Lien Laws, 1860, art. 64, § 2.

A mortgage to secure future advances not to exceed a limited amount may be enforced to the amount of the advances made upon it within that limit, although such advances were made after the mortgagee had received notice of a junior incumbrance.¹ The statute requiring the amount to be stated is a modification of the common law, under which the mortgage would be equally valid without such limitation.

In New Hampshire it is provided that no conveyance in writing of any lands shall be defeated, nor any estate incumbered by any agreement, unless it is inserted in the condition of the conveyance and made a part thereof, stating the sum of money to be secured, or other thing to be performed. And it is also provided that no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted, after the execution and delivery of such mortgage.² It is held, however, that a mortgage executed in good faith, conditioned to secure a definite sum, part of the consideration of which is the agreement of the mortgagee to pay certain sums to and for the use of the mortgagor, and to perform certain labor for the mortgagor, is neither prohibited nor fraudulent as against the creditors of the mortgagor.³ But the court did not wish to be understood as holding that a mortgage given to secure an absolute note, intended as a security for advances hereafter to be made, would be valid, if at the time of the execution of the mortgage the amount of the advances was not agreed upon, or the mortgagee was under no obligation to make them. Under this statute the mortgage may be void as to the part of the consideration which is altogether future, but valid for the part which was a debt at the time the mortgage was executed.⁴

In Georgia a mortgage may be made to secure future advances not limited in amount,⁵ although the statute of the state provides that a mortgage shall "specify the debt to secure which it is

¹ *Wilson v. Russell*, 13 Md. 494.

² Gen. Stat. p. 253, c. 122, §§ 2 and 3.

³ *Stearns v. Bennett*, 48 N. H. 400, 402.

⁴ *Leeds v. Cameron*, 3 Sum. 488; *Johnson v. Richardson*, 38 N. H. 353; *Bank v. Willard*, 10 N. H. 210.

⁵ *Allen v. Lathrop*, 46 Ga. 133. The debt was described as advances in supplies and money for the purpose of carrying on the farm for the year 1870.

given.”¹ So long as the means for determining the amount of the debt are pointed out, it is immaterial that the amount is not stated, or is from its very nature indefinite.²

367. Description of the intended advances. — A mortgage to secure future liabilities should describe the nature or amount of them with reasonable certainty. If the nature and amount of the incumbrance is so described that it may be ascertained by the exercise of ordinary discretion and diligence, this is all that is required.³ On this principle a mortgage for the payment of such sums of money as the mortgagee might advance, in pursuance of an agreement mentioned in the condition of a certain bond given by the mortgagee to the mortgagor of even date, contains reasonable notice of the incumbrance.⁴

A mortgage for \$200 was executed as a basis of credit to that extent for goods which the mortgagee might sell to the mortgagor, with the understanding that the mortgagor should make such payments that the balance against him should at no time exceed that amount. An account was opened and continued for some years. It was held that the condition of the mortgage was not exceptionable as not disclosing, with sufficient certainty, the nature and extent of the incumbrance.⁵ When the condition of

¹ Code, § 1945.

² *Allen v. Lathrop*, *supra*.

³ *United States v. Hooe*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34; *United States v. Sturges*, 1 Paine, 525; *Hubbard v. Savage*, 8 Conn. 215. This case did away with the doubt with which such mortgages were spoken of in the earlier cases of *Pettibone v. Griswold*, 4 Conn. 158; *Stoughton v. Pasco*, 5 Conn. 442; *Shepard v. Shepard*, 6 Conn. 38.

⁴ *Crane v. Deming*, 7 Conn. 387.

⁵ *Mix v. Cowles*, 20 Conn. 420.

Where the mortgagor, being insolvent, made a mortgage to secure a note of \$2,600, to a creditor to whom he was indebted in the sum of \$1,500, and who was surety for him in the sum of \$1,100 more, the mortgage was held a valid security for the \$1,500, but, as against the mortgagor's creditors, not for the part which was intended to indemnify the mortgagee

against his liabilities as surety, because that is a claim not described in the mortgage; and the real nature of the transaction should appear in the condition of the mortgage. *Sanford v. Wheeler*, 13 Conn. 165. On this principle the same court held, in *North v. Belden*, 13 Conn. 376, that a mortgage to secure a note of \$500, when in fact the mortgage was intended as security for such indorsements as the mortgagee might make for the mortgagor to that amount, and which were actually made and the notes paid by the mortgagee, was not valid against subsequent incumbrances. And so a condition to pay all notes which the mortgagee might indorse or give for the mortgagor, and all receipts which the mortgagee might hold against the mortgagor, was held to be too indefinite and uncertain to make the mortgage valid against subsequent parties in interest. There is nothing to limit the

a deed was, that "in case the grantor pays to the grantee the sum of \$1,600, with interest, on or before the first of January, 1843, then this deed shall be void and of no effect, otherwise to remain in full force," and the grantor then owed the grantee about \$1,100, and it was agreed that the grantee should advance him a further sum to make up the full amount of the mortgage, it was held that the condition sufficiently described the nature and character of the indebtedness to be secured, to constitute a valid security against subsequent incumbrances.¹

A mortgage conditioned for the payment of all sums due and to become due is sufficiently certain.² So is a mortgage "to secure all past indebtedness due and owing" from the mortgagor to the mortgagee.³ A mortgage conditioned to pay the mortgagee "what I may owe him on book" was construed to refer to future accruing accounts, upon its appearing that there was no account subsisting between the parties when the mortgage was given.⁴ Upon its appearing that the mortgage was given in part to cover future advances, the burden is upon the mortgagee to show what advances have been made.⁵

368. Advances after notice of subsequent liens. — A subsequent mortgage upon the same premises for an existing debt is entitled to precedence of advances made by a prior mortgagee with notice of the second.⁶ As will be presently noticed, this general proposition is subject to qualifications; but whenever a subsequent mortgage has precedence, as a general rule a subsequent judgment has precedence under like circumstances;⁷ but a mortgage for future unlimited advances is good against all advances made before recovery of the judgment.⁸ Advances covered by a mortgage have preference to the claims of junior incumbrancers,

liability, or to give others the means of finding out the extent of it. *Pettibone v. Griswold*, 4 Conn. 158.

These cases, however, are questioned, and in effect overruled, in later decisions in Connecticut, and are without general support elsewhere.

¹ *Bacon v. Brown*, 19 Conn. 29.

² *Insurance Co. v. Brown*, 11 Mich. 266.

³ *Machette v. Wanless*, 1 Colo. 225.

⁴ *McDaniels v. Colvin*, 16 Vt. 300.

⁵ *Fisher v. Otis*, 3 Chand. (Wis.) 83.

⁶ *Frye v. Bk. of Ill.* 11 Ill. 367; *Spader v. Lawler*, 17 Ohio, 371; *Hughes v. Worley*, 1 Bibb (Ky.), 200; *Bell v. Fleming*, 12 N. J. Eq. (1 Beas.) 13, 490.

⁷ *Brinkerhoff v. Marvin*, 5 Johns. (N. Y.) Ch. 320; *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78; *Yelverton v. Shelden*, 1b 481; *Goodhue v. Berrien*, 1b 630.

⁸ *Robinson v. Williams*, 22 N. Y. 380.

who have become such with notice of an agreement under the mortgage for the advances.¹

369. When mortgagee is not bound to make the advances. Mortgages to secure future advances or liabilities are valid and fixed securities against subsequent purchasers, or attaching creditors of the mortgagor, although the advances are made or the liabilities assumed after the record of such later deeds or attachments; and although it is optional with the mortgagee whether he will make such advancements or assume such liabilities or not, if they are made or assumed in good faith, and without notice of any subsequent intervening incumbrance.² But where the mortgagee is *not bound* to make the advances or assume the liabilities, and he has actual notice of a later incumbrance upon the property for an existing debt or liability, such later incumbrance will take precedence of the mortgage as to all advances made after such notice.³ Whether constructive notice by the record of the later incumbrance should have the same effect as actual notice, and whether the option of the mortgagee to make the advances should operate to give the mortgage effect as to subsequent incumbrances only from the time the advances are in fact made, are questions upon which the cases are not agreed. A mortgage was made to secure the mortgagee for his liability as indorser of such notes as the mortgagor might desire him to indorse within a certain time and amount, and at his option to do so. A second mortgage in similar terms was made to another indorser. It was held that the first mortgagee for such indorsements as he made after actual notice of the incumbrance of the second mortgage, and of the indorsements made under the security of it, should be postponed to such claims under the second mortgage.⁴ The principle of the decision is, that the mortgagee not being *bound* by his contract to make the indorsements or future advances, the equity of a junior incumbrancer for an existing debt, or of an attaching creditor, will intervene and take precedence of any advances made or liabilities incurred after actual notice of the

¹ *Kramer v. Bank of Stenbenville*, 15 Ins. Co. 1 Peters, 386; *Truscott v. King*, Ohio, 253; *Truscott v. King*, 6 N. Y. 6 Barb. (N. Y.) 346.
147.

² *Crane v. Deming*, 7 Conn. 387; *McDaniels v. Colvin*, 16 Vt. 300; *Shirras v. Mich.* 380, and cases cited.
Caig, 7 Cranch, 34; *Conard v. Atlantic* ³ *Boswell v. Goodwin*, 31 Conn. 74;

subsequent lien. Such junior incumbrancer or creditor acquires a lien upon the property as it then is; and as it is optional with the prior mortgagee whether he will advance or indorse any further, he is not allowed knowingly to prejudice the rights of subsequent incumbrancers, or destroy their lien, by adding voluntarily to his own incumbrance. They have an equity superior to his right to make further advances.¹

370. A mortgage for obligatory advances is a lien from its execution. — If by the terms of the mortgage an obligation is imposed upon the mortgagee to make the advances, the mortgage will remain security for all the advances he is required to make, although other incumbrances may be put upon the property before they are made, and he has knowledge of such incumbrances.² Thus, where a railroad company made a mortgage to a trustee upon all its property then owned, or afterwards to be acquired, to secure bonds which the company had agreed to issue to a contractor, in part payment for the building of its road, it was held that the mortgage took precedence of a lien for material afterwards furnished the company, and used upon the road, although

¹ A dissenting opinion was given in the case of *Boswell v. Goodwin*, by Butler, J., on the ground that "where, as in this case, neither the prior nor junior incumbrance is taken for an existing debt, but both are taken for the security of advances to be made, and are in all respects similar in character and purpose, there is nothing to create a superior equity in the junior incumbrancer; and the equitable principle, that he who is first in time is first in right, should be applied, and the prior mortgagee may fulfil his contract without regard to the subsequent mortgage."

"Contracts for future credit, assistance, or advances, are very common and important. They should yield to the *rights of creditors*, but they should not thus be interfered with by a contracting party, or any stranger who is not a creditor."

"If the principle is adopted in all cases, that each successive indorsement or each successive advance is a new debt or liability, and a new mortgage, coexisting

mortgages of that character upon the same property will be practically impossible. There must be either inquiry or notice, back and forth at each advance, for particulars of the new debts or new mortgages; and, upon principle, that notice should be filed in the records with the original mortgage, or *actually* given."

"In case of a mortgage to secure future advances, it is going a great way, in view of the authorities, but perhaps it is strictly equitable, that he should be held to constructive notice of a subsequent mortgage in favor of a creditor who acquires by a mortgage an equity superior to his subsequent advances, because as to them such junior mortgage is superior, and therefore prior in equity."

² *Nelson v. Iowa Eastern R. Co.* 8 Am. Railroad Rep. 82; *Moroney's Appeal* 24 Pa. St. 372; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585; *Wilson v. Russell*, 13 Md. 495; *Griffin v. Burnett*, 4 Edw. (N. Y.) Ch. 673; *Crane v. Deming*, 7 Conn. 387.

the advances were made after notice of the material-man's claim of a lien.¹

371. *Hopkinson v. Rolt*.²—The question in this case was accurately and tersely stated by Lord Chancellor Chelmsford in the judgment appealed from: "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it: is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?" In *Gordon v. Graham*,³ this question was answered affirmatively; but the House of Lords overruled this case, and answered the question in the negative.⁴ Lord Chancellor Campbell forcibly presents the argument for this view of the question. "The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of

¹ *Nelson v. Iowa Eastern R. Co.* *supra*.

² 9 Ho. Lords, 514.

³ See § 365. This decision had previously been questioned by Mr. Coventry, in a note to Powell on Mortg. 534, note (e), and by Lord St. Leonards, 2 Dru. & War. 431; 6 H. L. C. 597.

⁴ Lord Cranworth delivered a dissenting opinion, supporting the view taken of the law by Lord Cowper, in *Gordon v. Graham*.

"Mortgages are but contracts," he said, "and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is once laid down and understood, that a person advancing money on a second mortgage, with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior secu-

urity, he has nothing to complain of. He is aware, when he advances his money, of the imperfect nature of his security, and acts at his peril. . . .

"Considering, then, the state of the authorities on this subject, and the opinions of eminent conveyancers, I have come to the conclusion that the law was correctly laid down by Lord Cowper. The rule propounded by him is a convenient rule, causing injustice to no one. It has, probably, been often acted on, and to depart from it may, I think, retrospectively cause great injustice, and prospectively prevent advances of money by bankers or others, where such advances might be safely and usefully made, and where, as in this case, the second mortgage is, like the first, a security for future as well as present advances, great difficulty must arise in settling the priorities of the two mortgages in respect to future advances."

the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistent with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee, as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make farther advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee, in making the advances, with notice of the first mortgage; for, by the hypothesis, each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse farther advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider, as they do, as often as they discount a bill of exchange, what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss."

372. A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice from the recording of the second mortgage. Such, it is conceived, is the rule, supported by reason and the weight of authority.¹ It is elsewhere observed that the recording acts give notice to subsequent purchasers and incumbrancers, and do not affect those whose rights are already fixed by the previous record of their own deeds.²

¹ Collins v. Carlile, 13 Ill. 254; Rowan v. Sharps Man. Co. 29 Conn. 282; McDaniel v. Colvin, 16 Vt. 300; True-scott v. King, 6 Barb. (N. Y.) 346; 6 N. Y. 166; Robinson v. Williams, 22 N. Y. 380; Ward v. Cooke, 17 N. J. Eq. 93; Wilson v. Russell, 13 Md. 495; Nelson v. Boyce, 7 J. J. Marsh. (Ky.) 401.

² See chapter xi. on "REGISTRATION." See article on this subject 11 Am. Law

Reg. N. S. 273, by the learned editor, who in conclusion remarks: "So far as we may venture a personal opinion, therefore, we think the rule that the recording of the second mortgage is not notice to the first mortgagor is supported by the better reasons, and that the weight of authority is still in its favor, though we are bound to concede that of late there is an apparent tendency to the opposite rule."

Whether the mortgage intended to secure future advances discloses the nature of the transaction or not, there is no good reason why it should not remain a valid security for all advances that may be made, until the mortgagee receives actual notice of subsequent claims upon the property. The burden of ascertaining the amount of an existing incumbrance should rest upon him who takes a conveyance of the property subject to the mortgage. He has notice by the record of the existence of a mortgage for the full amount of the intended advances; and if he wishes to stop the advances where they are at the time of recording his subsequent deed, it is only reasonable to require him to give actual notice of his claim upon the property; otherwise he should not be heard to complain that the prior incumbrance amounts at any future time to the full sum for which it appeared of record to be an incumbrance. Nevertheless, there are some authorities to the effect that the first mortgagee has constructive notice of the second mortgage from the record of it.¹ This position is supported by Mr. Justice Christiancy, of Michigan, in an elaborate opinion, in which a mortgage for future optional advances is treated as effectual only from the time the advances are actually made.² "The instrument can only take effect as a mortgage or incumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. Until this takes place, neither the land, nor the parties, nor third persons, are bound by it. It constitutes, of itself, no binding contract. Either party may disregard or repudiate it at his pleasure. It is but a part of an arrangement merely contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties, till subsequently assented to or adopted by both."

As to the inconvenience which is supposed to result to the first mortgagee by requiring him to examine the record every time he makes advances upon such a mortgage, the learned judge says: "It is, at most, but the same inconvenience to which all other

¹ *Spader v. Lawler*, 17 Ohio, 371, by a divided court; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170; S. C. *sub nomine Parker v. Jacoby*, 3 Grant (Pa.), 300; *Ter-Hoven v. Kerns*, 2 Pa. St. 96. This question was discussed but not decided in *Boswell v. Goodwin*, 31 Conn. 74; 12 Am. Law Reg. 79, note by Judge Redfield. And see 11 Ib. 1.

² *Ladue v. Detroit & Milwaukee R. Co.* 13 Mich. 380; many cases are cited and discussed.

parties are compelled to submit when they lend money on the security of real estate — the trouble of looking to the value of the security. But, in truth, the inconvenience is very slight. Under any rule of decision they would be compelled to look to the record title, when the mortgage is originally taken. At the next advance they have only to look back to this period; and for any future advance, only back to the last, which would generally be but the work of a few minutes, and much less inconvenience than they have to submit to in their ordinary daily business in making inquiries as to the responsibility, the signatures, and identity of the parties to commercial paper. But if there be any hardship, it is one which they can readily overcome, by agreeing to make the advances; in other words, by entering into some contract, for the performance of which, by the other party, the mortgage may operate as a security. They can hardly be heard to complain of it as a hardship that the courts refuse to give them the benefits of a contract which, from prudential or other considerations, they were unwilling to make, and did not make until after the rights of other parties have intervened. Courts can give effect only to the contracts the parties have made, and from the time they took effect.”

When there is no obligation upon the mortgagee to make the advances, and the amount of them and the times when they are to be made are not agreed upon, some authorities hold that the mortgage is a lien as against intervening incumbrances, only from the time the advances upon it are made, and not from the time of the execution of the mortgage. This was the decision with reference to a mortgage given to secure the payment of notes and bills to be discounted for the mortgagor, and for all liabilities of every kind he might be under to the mortgagee.¹ When a mortgage is given to secure future accommodation indorsements, the amount of which is wholly undefined, a subsequent mortgage or deed taken in good faith is held to have precedence as to any indorsements made afterwards.²

373. Rule that a mortgage for definite advances has priority in all cases. — Notwithstanding all the distinctions and refinements which have been introduced into the law of this subject

¹ *Bank of Montgomery's Appeal*, 36 Pa. St. 170; *McClure v. Roman*, 52 Ib. 458; ² *Babcock v. Bridge*, 29 Barb. (N. Y.) 427.
Parker v. Jacoby, 3 Grant (Pa.), 300.

by the many conflicting adjudications upon it, there is strong reason and authority for the rule, that a mortgage to secure future advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may by ordinary diligence ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee had notice of them. If the mortgage contains enough to show a contract between the parties, that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it he is not entitled to protection as a *bonâ fide* purchaser. Such a mortgage is considered as good against subsequent incumbrances to the full amount of the advances provided for, and the mortgagee is held to have a right to rely upon it, and to make such advances without regard to what other incumbrances may afterwards have been put upon the property.

This view of the doctrine of mortgages to secure future advances is strongly expressed by Mr. Justice Campbell in a recent case in Mississippi.¹ He says: "There has been much diversity of views between courts and law writers on the question of the validity of mortgages for future advances, and the rights of mortgagees in such mortgages as against purchasers and junior incumbrances of the mortgaged property. Some have held, that a mortgage which does not specify that for which it is given so distinctly as to give definite information on the face of the mortgage of what it secures, so as to render it unnecessary for the inquirer to look beyond the mortgage and seek information *aliunde*, is void as against creditors and purchasers. Others have held that a mortgage for future advances is valid as to all advances made under it, before notice by the mortgagee of the supervening rights of purchasers or incumbrancers. Others have announced that a mortgage for future advances to be made, or liability to be incurred, when duly recorded, is valid as a security for indebtedness

¹ *Witezinski v. Everman*, 51 Miss. 841-845.

incurred under it, in accordance with its terms. There have been suggested modifications of these views, and a distinction has been drawn between mortgages in which the mortgagee is obligated to advance a given sum, and those in which he is not so bound. We decline to follow the devious ways to which we are pointed by conflicting adjudications and suggestions, and prefer to pursue the plain path in which principle directs us, and will declare the rule to be observed in the courts of this state on the subject under consideration, which, strangely enough, has not been heretofore decided in this state. A mortgage to secure future advances, which on its face gives information as to the extent and purpose of the contract, so that a purchaser or junior creditor may, by an inspection of the record, and by ordinary diligence and common prudence, ascertain the extent of the incumbrance, will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose. It is not necessary for a mortgage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If it contains enough to show a contract that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it in the proper quarter, he cannot claim protection as a *bonâ fide* purchaser. The law requires mortgages to be recorded for the protection of creditors and purchasers. When recorded, a mortgage is notice of its contents. If it gives information that it is to stand as security for all future indebtedness to accrue from the mortgagor to the mortgagee, a person examining the record is put upon inquiry as to the state of dealings between the parties, and the amount of indebtedness covered by the mortgage, and is duly advised of the right of the mortgagee by the terms of the mortgage to hold the mortgaged property as security to him for such indebtedness as may accrue to him. Thus informed, it is the folly of any one to buy the mortgaged property, or take a mortgage on it, or give credit on it; and if he does so, his claim must be subordinated to the paramount right of the senior mortgagee, who in thus securing himself by mortgage, and filing it for record, as required by

law, has advertised the world of his paramount claim on the property covered by his mortgage, and is entitled to advance money and extend credit according to the terms of his contract thus made with the mortgagor, who cannot complain, for such is his contract; and third persons afterwards dealing with him cannot be heard to complain, for they are affected with full notice, by the record, of what has been agreed on by the mortgagor and mortgagee."

374. It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount.¹ This definite sum will then limit the extent of the lien. There must be some limit to the amount which the mortgage is to secure, either by express limitation, or by stating generally the object of the security. If the limit be not defined in any way, it can be good only for the advances made at the time, and such others as may afterwards be made before any other incumbrances are made upon the property mortgaged.² The sum expressed by the mortgage may cover a present indebtedness as well as future advances, and it is not necessary that the one should be separated from the other on the face of the mortgage.³

An absolute conveyance may be used to secure future advances, or to secure an existing debt, and also future advances. The agreement to reconvey when the advances are repaid is sufficient, although it exists in parol only.⁴

375. A verbal agreement for advances is sufficient. — The agreement under which advances to a certain amount are to be made need not be in writing, to be binding and effectual against subsequent liens: thus, if a mortgage is made to secure future

¹ *Collins v. Carlile*, 13 Ill. 254; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) Ch. 293; *Murray v. Barney*, 34 Barb. (N. Y.) 336; *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78; *Wescott v. Gunn*, 4 Duer (N. Y.), 107; *Walker v. Suedliker, Hoff.* (N. Y.) Ch. 145; *Townsend v. Empire Stone Dressing Co.* 6 Duer (N. Y.), 208; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey, &c. Co.* 11 N. J. Eq. (3 Stock.) 49.

² *Robinson v. Williams*, 22 N. Y. 380; *Fassett v. Smith*, 23 N. Y. 252.

³ *Tully v. Harloe*, 35 Cal. 302; *Summers v. Roos*, 42 Miss. 749.

⁴ *Harper's Appeal*, 64 Penn. St. 315; *S. C. 7 Phila.* 276; *Rhines v. Baird*, 41 Ib. 256; *Kellum v. Smith*, 33 Ib. 158; *Fessler's Appeal*, 75 Ib. 483; *Myers's Appeal*, 42 Ib. 518. See, however, *Metro-politan Bank v. Godfrey*, 23 Ill. 579.

advances to be used in the construction of a building on the mortgaged land, and a mortgage for the contemplated amount is made and recorded, it has priority against a mechanic's lien for materials furnished in the construction of such building to the full amount of the mortgage, if the advances are actually made to that amount, although the agreement under which they are made is verbal only.¹ If such agreement be in writing it is not necessary that it should appear of record.²

376. The amounts and times of the advances may be shown by parol. — The omission to state on the face of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time, as the mortgagor may desire, during a specified period.³ The amounts of the several advances, and the times when they were actually made, may be shown by extrinsic proof, for in such case the proof does not contradict the mortgage, or alter its legal operation and effect in any way. Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent.⁴

When a mortgage has been given in terms to secure future advances and acceptances, and the mortgagee in a suit to enforce the mortgage produces drafts of the mortgagor upon him, there is no presumption that the drafts were drawn against funds of the drawer, but the burden is upon the mortgagor to show this if he makes the claim.⁵

377. Limitations of the security must be observed. — Although, as already seen, a mortgage made in good faith to secure future debts expected to be contracted, or advances to be made, in the course of dealing between the parties, is a good and valid

¹ *Platt v. Griffith*, 27 N. J. Eq. 207. The court, citing *Moroney's Appeal*, 24 Pa. St. 372; *Taylor v. La Bar*, 25 N. J. Eq. 222; *Macintosh v. Thurston*, Ib. 242, remark that in each of these cases there was a written agreement on the part of the mortgagee binding him to furnish the money, but regard this circumstance as of no consequence.

² *Taylor v. Cornelius*, 60 Pa. St. 187; *Moroney's Appeal*, 24 Ib. 372; *Thomas v. Davis*, 3 Phila. (Pa.) 171.

³ *Wilson v. Russell*, 13 Md. 494; and see *Ahern v. White*, 39 Md. 409.

⁴ *Foster v. Reynolds*, 38 Mo. 553; *Cole v. Runge Gill* (Md.), 412.

⁵ *Lewis v. Wayne*, 25 Ga. 167.

security,¹ yet if limited by the terms of the mortgage, either as to amount or the time within which the advances are to be made, or the nature of them, the limitation must be strictly observed; thus a mortgage to secure credits or advances to be made within a limited time secures none made afterwards.²

If limited in amount and time, and the full amount be once advanced and repaid, and further loans are made within the time limited, these are covered by the mortgage as against subsequent purchasers.³

378. If the mortgagee advance only a part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance,⁴ and for so much only. And so a mortgage given for a loan and for the price of lands to be conveyed, and the mortgagee wrongfully refuses to convey the land, it can be enforced only for the money advanced.⁵

When a mortgage is an open one, as for instance one made by an absolute conveyance, or to secure undefined future advances, the mortgagee is entitled to recover under it only so much as he shows affirmatively to be due. Any doubt and uncertainty, it is said, should operate against the mortgagee, and not in his favor.⁶

3. *Mortgage of Indemnity.*

379. Description of the indemnity. — Very much of what has already been stated, in regard to present and future debts secured by mortgages, is applicable to mortgages made to indemnify a mortgagee against liabilities incurred or to be incurred by him in behalf of the mortgagor. Mortgages of indemnity are perhaps most often given as security for liabilities to be incurred in the future, so that they are to this extent mortgages to secure future advances. Such mortgages generally declare the purpose for which they are given, and set out particularly the liabilities incurred or

¹ Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270; United States v. Hoove, 3 Cranch, 73; Shirras v. Caig, 7 Cranch, 34; James v. Morey, 2 Cow. (N. Y.) 292; Lansing, 4 Johns. (N. Y.) Ch. 73; Bank of Utica v. Finch, 3 Barb. (N. Y.) Ch. 293; Walker v. Snediker, Hoff. (N. Y.) Ch. 145; Yelverton v. Shelden, 2 Sandf. (N. Y.) Ch. 481.

² Miller v. Whittier, 36 Me. 577.

³ Wilson v. Russell, 13 Md. 494.

⁴ See Dart v. McAdam, 27 Barb. 187; and see Freeman v. Auld, 44 Barb. (N. Y.) 14.

⁵ Robinson v. Cromelein, 15 Mich. 316.

⁶ Kline v. McGuckin, 25 N. J. Eq. 433.

to be incurred by the mortgagee. But this is not essential. A mortgage given for a definite sum, without specifying the liabilities secured, may be shown by parol evidence to have been given to indemnify the mortgagee against his liability as an indorser or surety for the mortgagor.¹ Thus, where a mortgage recited that the mortgagor was indebted to the mortgagee in a certain sum, "being for money advanced," and that the mortgage was made to secure the payment of such debt, the mortgagee was not precluded from showing that the real consideration of the mortgage was the indorsement by him of the mortgagor's note for that sum. "The question of consideration was raised by the defendant's proving, by the mortgagee, that no money was advanced to him upon the mortgage. It thus became proper, if not necessary, to show what the real consideration was, and this was all that was done. The plaintiff had a valid mortgage, as to the mortgagor." He would not be permitted to impeach it by showing that the consideration was not money advanced to him, and shut out evidence of the true consideration.² "There cannot be a more fair, *bonâ fide*, and valuable consideration, than the drawing or indorsing of notes at a future period, for the benefit and at the request of the mortgagor; and nothing is more reasonable than the providing a sufficient indemnity beforehand."³ It is undoubtedly desirable that the true consideration be fully stated, and when this is not done, the instrument may be open to the suspicion that it was made to deceive the mortgagor's creditors; but the true consideration may in all cases be explained.⁴

380. A general description of the liability is sufficient.—A mortgage to indemnify an indorser for liability on notes to be indorsed within two years from the date of the mortgage, to an amount not exceeding \$16,000 at any one time, and a renewal of such notes, was sustained as against a purchaser from the mortgagee.⁵ A mortgage to indemnify one for indorsing "a note of

¹ *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. 14; *McKinster v. Babcock*, 26 N. Y. 378; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) Ch. 293.

² Per Marvin, J., in *McKinster v. Babcock*, *supra*.

³ Per Tilghman, C. J., in *Lyle v. Duncomb*, 5 Binn. (Pa.) 585, 590.

⁴ *McKinster v. Babcock*, *supra*; *Gardner v. Webber*, 17 Pick. (Mass.) 407, 414; *Commercial Bank v. Cunningham*, 24 Ib. 270.

⁵ *Udley v. Smith*, 24 Conn. 290. The court, Ellsworth, J., said: "Were this an original question, it would be difficult, we think, to sustain the deeds against this

\$2,000, made payable to the order of the grantor, and by him signed and indorsed," is not void for uncertainty. The note intended may be identified by parol evidence.¹ A condition to indemnify the mortgagee against liability as surety for the mortgagor, a certain sum being mentioned, be the debts more or less, covers all debts for which the mortgagee is surety, be they more or less.² A mortgage conditioned to save the mortgagee harmless for indorsing notes for the mortgagor, when thereafter requested, to the amount of \$7,000, and also renewal notes, is not invalid for uncertainty, as against subsequent incumbrances.³ Nor is a mortgage invalid which is given to secure an "accommodation indorser and signer on sundry notes, drafts, and bills of exchange, now maturing in sundry banks, and in the hands of sundry individuals, to the amount of \$50,000, a particular description of which we are not able to give, or in whose hands they are."⁴ A recital in a mortgage that the mortgagee had indorsed two bills of exchange, when in fact he had indorsed only one, and had paid the other for the honor of the drawer, does not invalidate the security.⁵ A mortgage for a definite sum, but expressed to be "given to secure whatever indebtedness may at any time exist from the mortgagor to the mortgagee," does not restrict the indebtedness secured to such debts as may be contracted directly from the mortgagor to the mortgagee, but includes also any obligations the mortgagor may incur by indorsing the notes of another party. The terms of the mortgage are broad enough to cover any kind of indebtedness.⁶

A mortgage made to secure indorsers upon a note contemplated to be discounted at a particular bank, and so expressed in the deed, is valid, although the note be discounted in a bank other than that named, and is subsequently transferred to a third bank. A subsequent incumbrancer cannot invalidate the mortgage for this reason, unless he can show that he was misled by this description,

objection; but it is not; and although our early decisions would hold them void, for vagueness, our decisions for the last ten or fifteen years have gone further, and established the law to be liberal enough to sustain mortgages quite as indefinite as the present."

¹ *Goddard v. Sawyer*, 9 Allen (Mass.), 78.

² *Orr v. Hancock*, 1 Root (Conn.), 265.

³ *Ketchum v. Jauncey*, 23 Conn. 123.

⁴ *Lewis v. De Forest*, 20 Conn. 427.

⁵ *Fetter v. Cirode*, 4 B. Mon. (Ky.) 482.

⁶ *First Nl. Bank of Paterson v. Byard*, 26 N. J. Eq. 255.

and advanced money upon the land, or acquired an interest in it after inquiry, and in the confidence that no such lien existed.¹

381. All limitations of the security must be observed. — But if the sum for which the mortgage of indemnity is given be limited, the security cannot be extended beyond that amount. In order to create a liability upon a mortgage made to guarantee a contemplated loan to another, the loan must correspond with the recital of it in the mortgage.²

A mortgage made to secure one from all liability, which he may incur by reason of his becoming surety or indorser on the notes of the mortgagor, does not secure notes given to the mortgagee for money loaned by him, and as evidence of such loan;³ and a mortgage conditioned for the payment of all sums of money owing by the mortgagor to the mortgagee as maker or indorser of any notes, bills of exchange, bonds, checks, or securities of any kind given by him, does not secure a debt not evidenced by an instrument in writing.⁴

382. A continuing security. — A mortgage given to indemnify an indorser or surety on a note is a continuing security for all renewals of such note until it is finally paid.⁵ So long as the liability continues, the security continues also.⁶ Although made for a definite sum to a bank to secure the liabilities of a firm for the payment of certain notes, the bank stipulating to discharge the mortgage when the mortgagors should cease to be under any liabilities to the bank, it is a valid security for new notes given to the bank in renewal of the original notes, and subsequent purchasers cannot object to it because the agreement of the bank was not recorded, or that the new notes were made or indorsed by a new firm, formed by taking in another partner.⁷ Under a mort-

¹ *Patterson v. Johnston*, 7 Ohio, 225.

² *Thomas v. Olney*, 16 Ill. 53; and see *Ryan v. Shawneetown*, 14 Ill. 20; *Griffiths, re*, 1 Lowell, 431; *Townsend v. Empire Stone Dressing Co.* 6 Duer (N. Y.), 208.

³ *Clark v. Oman*, 15 Gray (Mass.), 521.

⁴ *Walker v. Paine*, 31 Barb. (N. Y.) 213; and see *Lauderdale v. Hallock*, 15 Miss. (7 S. & M.) 622.

⁶ *Chapman v. Jenkins*, 31 Barb. (N. Y.)

164; *Brinckerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65; *Babcock v. Morse*, 19 Barb. (N. Y.) 140.

⁶ *Hawkins v. May*, 12 Ala. 673.

⁷ *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270. The mortgage may properly provide in terms that it shall be a continuing security. *Fassett v. Smith*, 23 N. Y. 252.

gage given to secure the maker of accommodation notes, and renewals of them from time to time, it is not necessary, in order to constitute the new notes renewals, that they should be given for the same amounts, and at the same periods as the original notes, or that each should be applied to discharge its immediate predecessor.¹

A mortgage to indemnify a surety upon a guardian's bond applies to a renewal of the bond.²

383. When a lien from the time of the execution of the mortgage. — A mortgage of indemnity to a surety is a lien from the time of its execution, and not merely from the time when the mortgagee pays the debt on which he is surety, and therefore it takes precedence of a conveyance made by the mortgagor or a judgment rendered against him, after the execution of the mortgage and before the mortgagee has paid the debt so as to become entitled to enforce the security.³ It is sometimes said that a mortgage given to secure one who is expected to make, indorse, or accept negotiable paper for the accommodation of another, is a lien from the time such liability is incurred; ⁴ but whenever there is a legal obligation to incur the liability, the mortgage is a lien from the time of its delivery.⁵ When there is no obligation to incur such future liabilities the mortgage constitutes a lien from the time the liability is incurred, and is preferable to a judgment rendered afterwards,⁶ but not to incumbrances made before advances, of which the mortgagee had notice at the time of the advances.

384. Evidence to fix the amount secured by the mortgage. — Parol evidence is admissible to show the true character of a mortgage and for what purpose and what consideration it was given. Although it be for a definite sum and secures the payment of notes for definite amounts, it may be shown that the mortgage

¹ *Gault v. McGrath*, 32 Pa. St. 392.

36 Pa. St. 170; *Bank of Commerce Appeal*, 44 Ib. 423.

² *Bobbitt v. Flowers*, 1 Swan (Tenn.), 511.

⁵ *Taylor v. Cornelius*, 60 Pa. St. 187;

³ *Watson v. Dickens*, 20 Miss. (12 S. & M.) 608; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287.

Lyle v. Ducomb, 5 Binn. (Pa.) 585.

⁶ *Kramer v. Farmers', &c. Bank*, 15 Ohio, 253; *Hartley v. Kirlin*, 45 Pa. St.

⁴ *Choteau v. Thompson*, 2 Ohio St. 114; *Bank of Montgomery Co. Appeal*,

49.

was simply one of indemnity.¹ When the object is simply to indemnify the mortgagee for a liability he has incurred or may incur, the amount of the mortgage, or of the mortgage note, serves merely to limit the extent of the security. Upon the foreclosure of such a mortgage, the amount for which judgment is to be rendered is the amount the mortgagee has been compelled to pay under the liability for which he was secured, with interest from the date of the payment. The amount and date of the mortgage note are wholly disregarded in ascertaining this sum.²

385. When the principal creditor becomes entitled to security given to a surety.—The principal creditor is not entitled to the benefit of a mortgage given to indemnify an accommodation indorser until the absolute liability of the indorser is fixed.³ If the indorser is discharged by the laches of the creditor, he cannot claim the benefit of the mortgage.⁴ The condition of such a mortgage is broken when the mortgagor fails to pay the debt at the time stipulated, so that the mortgagee is exposed to a suit.⁵ He may then at once proceed to foreclose the mortgage without notice or further action on his part.⁶ When the condition is to indemnify the mortgagee against the support of a third person, it is a sufficient breach that the mortgagee is compelled to pay for such support for a part of the time.⁷

If the mortgage to the surety include a debt due to himself, as well as the debt for which he is liable as surety, as between himself and the principal creditor, the latter is entitled to be first paid out of the proceeds of the mortgage, on the ground that such mortgagee is a *quasi* trustee for the creditor in respect of the indemnity thus obtained.⁸

386. Whether surety may release the security.—Under what circumstances one who has taken a mortgage solely for his own indemnity as a surety for the debt of another may release the security does not seem to be determined. As against the principal creditor who is entitled to the benefit of the securities

¹ Price v. Gover, 40 Md. 102.

² Athol Savings Bank v. Pomroy, 115 Mass. 573; and see § 64.

³ Tilford v. James, 7 B. Mon. (Ky.) 336.

⁴ Tilford v. James, *supra*.

⁵ Shaw v. Loud, 12 Mass. 447.

⁶ Butler v. Ladue, 12 Mich. 173.

⁷ Whitton v. Whitton, 38 N. H. 127.

⁸ Ten Eyck v. Holmes, 3 Sandf. (N. Y.) Ch. 428.

held by the surety, it would seem at any rate that after a default on the part of the principal debtor, and the liability of the surety had thus become fixed, he could not release the securities held by him. As against his own creditors after he has become insolvent, it would also seem that he could not release a mortgage or other security held by him as indemnity.¹ If the mortgage held by him be anything more than one of indemnity, if it in terms secures the original debt, he has no right to discharge it.

An indorser of certain notes took from the maker of them a mortgage as security from any loss the indorser might sustain from the non-payment of the notes. The proviso was that the mortgagor should pay the notes at their maturity "to the holders of them," or to the indorser, should he be compelled to take them up; the mortgagee subsequently released the mortgage before the notes were paid, and the mortgagor conveyed the premises to a purchaser. The holder of the mortgage notes then filed a bill to foreclose the mortgage; and it was held that the mortgage was a security for the payment of the notes, as well as an indemnity to the indorser; that it enured to the benefit of any one in whose hands the notes might be, provided he is a *bonâ fide* holder of them; and that consequently the mortgagee had no power to release the mortgage, so as to deprive the holder of the notes of the benefit of this security.²

387. Not after liability is fixed. — A mortgage given to indemnify a surety or indorser does not, in the first instance, attach to the debt; and whatever equity may arise in favor of the creditor with regard to the security arises afterwards, and in consequence of the insolvency of the parties primarily holders for the debt. Until this equity arises, the surety has a right in equity as well as at law to release the security. Even after such insolvency the mortgagee may surrender the security, if he does it in good faith, and before any claim is made upon him for it. The application of it for the benefit of third persons can only be accomplished by the interposition of a court of equity, and in case the mortgagee still retains the security.³

¹ Woodville v. Reed, 26 Md. 181.

Jones v. Quinnipiack Bank, 29 Conn. 25;

² Boyd v. Parker, 43 Md. 182.

Post v. Tradesmen's Bank, 28 Conn.

³ Thrall v. Spencer, 16 Conn. 139; 420.

Homer v. Savings Bank, 7 Conn. 478;

But after the principal debtor has become insolvent, the surety cannot make a valid agreement with the holder, or any party interested in one of the notes on which he is indemnified by the mortgage, that the security shall be first applied to such note; the holders of all such notes are entitled in equity to share in the property in proportion to their respective claims.¹

When a mortgage is given to indemnify an indorser, the creditor has an equitable claim to the security, and after the liability is fixed is entitled to have the mortgage assigned to him. This is the rule not only where the condition is that the mortgagor shall pay the debt, but also where it merely stipulates that he shall indemnify the surety.² Thus, a mortgage by the principal maker of a promissory note to his surety, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and even after the surety's liability to the holder of the note is barred by the statute of limitations, he holds the property subject to such trust and lien.³ If he has foreclosed the mortgage, and obtained an absolute title to the property, the same trust still attaches to it.⁴ This equitable lien binds the property, after a transfer of it by the mortgagee to one who has notice of the trust. The mortgage is treated as a mere security for the debt; and when the debt is assigned by the mortgagee, it carries with it in equity, as an incident, a right to have the estate appropriated for the payment of the debt in the hands of the assignee. To carry out and enforce this equity, the mortgagee is regarded as the trustee of those to whom he has assigned the debt secured by the mortgage, and can be compelled to appropriate it for their benefit.⁵

4. *Mortgages for Support.*

388. Sometimes held not to be strictly mortgages.—It has sometimes been questioned whether a deed conditioned for the support and maintenance of a person, or for the performance of any other duty the damages for a breach of which are unliquidated, can be regarded as strictly a mortgage. Early definitions

¹ *Lewis v. De Forest*, 20 Conn. 428.

27 N. H. 236; *Phillips v. Thompson*, 2 Johns. (N. Y.) Ch. 418.

² *New Bedford Inst. for Savings v. Fairhaven Bank*, 9 Allen, 175; *Aldrich v. Martin*, 4 R. I. 520; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525 *Riddle v. Bowman*,

³ *Eastman v. Foster*, 8 Met. (Mass.) 19.

⁴ *Eastman v. Foster*, *supra*.

⁵ *Rice v. Dewey*, 13 Gray (Mass.), 47.

of mortgages are found by which no conditional conveyances are mortgages except such as are made for the security of a loan of money ; others include all conveyances made as security for any debt ; while the later doctrine generally is, that a conveyance conditioned for the performance of any contract is a mortgage.¹ But in quite recent cases it is said that many contracts, the performance of which may be secured by conveyances of land, have such peculiarities that the rules of law relating to mortgages can have but a very partial if any application to them.² In New Hampshire, although it is provided by statute³ that "every conveyance of lands made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage," it is held that a deed conditioned for support, and implying the personal services of the mortgagor, is not a mortgage. Neither the grantor nor the grantee, under such a deed, can assign his interest. The contract is for services to be rendered by the one in person to the other in person. The former having assumed a personal trust, cannot substitute another person in his place to fulfil it.⁴ Upon his death, a sale of the estate by his administrator under license of court subject to this duty passes no title, and the purchaser cannot maintain a bill to redeem.⁵ And on the other hand, it is held that the person who is to receive the personal service cannot assign the obligation and security to another, so as to enable such other person to enforce it, unless, perhaps, where there has been an actual breach and an entry for condition broken before the assignment.⁶

In Pennsylvania, upon somewhat different grounds, it is said that

¹ Per Bell, C. J., in *Bethlehem v. Annis*, 40 N. H. 34.

² *Bethlehem v. Annis*, *supra*, per Bell, C. J.

³ Gen. Stat. 1867, 253, ch. 122, § 1.

⁴ *Flanders v. Lamphear*, 9 N. H. 201. See, however, *Austin v. Austin*, 9 Vt. 420 ; *Bryant v. Erskine*, 55 Me. 153.

⁵ *Eastman v. Bachelder*, 36 N. H. 141.

⁶ *Bryant v. Erskine*, 55 Me. 153 ; *Bethlehem v. Annis*, 40 N. H. 34. In this case Chief Justice Bell said :—

"Wherever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a

mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to a limited extent, and the party, if relieved by a court of equity from the forfeiture resulting from the non-performance of the condition, will not be relieved as in cases of a mortgage. It is not, however, intended to say that the same principle of justice, which has led courts of equity to establish the system of relief from forfeitures in the case of mortgages, will not entitle a party to analogous relief in cases where the design of the parties is to make a conveyance by way of security."

when a father conveys land to his son, and takes a reconveyance, conditioned for the faithful performance of covenants to support, although such reconveyance may be termed a mortgage, it is something more than a mortgage; for in an ordinary mortgage, when the object of security is accomplished, the conveyance becomes void; but if there be a breach of the condition to support, and the father in consequence takes possession, the son cannot claim upon his father's death that the title should vest in him, notwithstanding he has failed to perform his covenants. That would be no security that the son would perform his covenants, but an inducement for him to break them. It would enable him to throw off all the trouble and responsibility of his contract, and simply by waiting a few years without doing anything, get the property for nothing. Nothing can give effectual security for the performance of such covenants but the right to revest the entire estate upon a breach. The son having broken his covenants to support his father during life, has no possible equity on his death to demand a reconveyance. A recovery in ejectment by the father after breach as effectually revests the title in him as would a reëntury for condition broken.¹

But the courts generally treat as mortgages conveyances conditioned for the support and maintenance of the mortgagees. They are generally in such terms that the court can by an award of damages compensate the mortgagees for a non-performance of the personal services;² but it rests in the sound discretion of the court whether a forfeiture shall be relieved in this way.³

389. Mortgagor's right of possession implied. — Generally, when land has been conveyed to the mortgagor by the mortgagee, who has taken a mortgage of the same, conditioned for his support, there is a necessary implication, nothing appearing to the

¹ *Soper v. Guernsey*, 71 Pa. St. 219. The defeasance in this case was: "Provided always, nevertheless, that if the said party of the first part shall and does well, truly and faithfully perform all and singular the aforesaid covenants, promises, and agreements unto the said party of the second part, according to the true intent and meaning thereof, without fraud or delay, then this indenture and the estate

hereby granted shall become void and of none effect."

² 2 Greenl. Cruise, 80, n.; *Hoyt v. Bradley*, 27 Me. 242; *Austin v. Austin*, 9 Vt. 420. Chancellor Phelps, in this case, said: "There is, certainly, no difficulty in making compensation for past maintenance, any more than in any case of a contract to perform services."

³ *Henry v. Tupper*, 29 Vt. 358.

contrary, that the mortgagee is not to enter until there is a breach of the condition.¹ The possession of the property is generally essential to the mortgagor to enable him to perform the condition. The mortgagee cannot then maintain an action for possession until there has been a breach of condition.

390. Alternative condition. — When a mortgage is conditioned to pay a certain sum *or* to support the mortgagees, the mortgagor has his election which alternative he will take, and if he elect to furnish support, he is entitled to possession of the premises in order to be enabled to comply with the condition he has chosen to perform. But having once made the election he cannot revoke it. His election is also conclusive upon the mortgagee, who cannot have the election in the beginning, and much less can he have part performance of one of the alternatives, and then claim the entire performance of the other.² The election having been made, the mortgage becomes security for the performance of the condition chosen as effectually as if that alone had been set forth.³

But a mortgage to secure the payment of \$500 in five years, "to be paid in furnishing the mortgagee," during that period, "a good and sufficient home and support," does not give the mortgagor his election to pay in money.⁴

391. Where the support is to be furnished. — When no place is stipulated where the mortgagee is to receive support, he has a right to be supported wherever he may choose to live, provided he does not create any needless expense to the mortgagor.⁵ When it is provided that the support is to be furnished on the granted premises, but that the mortgagor, with his family, may also reside there, the latter has no right to insist that the mortgagee

¹ *Flanders v. Lamphear*, 9 N. H. 201; *Rhoades v. Parker*, 10 N. H. 83; *Dearborn v. Dearborn*, 9 N. H. 117; *Brown v. Leach*, 35 Me. 41; *Bryant v. Erskine*, 55 Me. 153. See § 80.

² *Bryant v. Erskine*, 55 Me. 153. "It is laid down as a general rule that, in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the decision. As if a man grants a rent of 20s. or a robe

to one and his heirs, the grantor shall have the election, for he is the first agent, by payment of one or the delivery of the other." 3 Bac. Abr. Election, B, p. 309.

³ See *Furbish v. Sears*, 2 Cliff. 454.

⁴ *Hawkins v. Clermont*, 15 Mich. 511; and see *Evans v. Norris*, 6 Mich. 369.

⁵ *Wilder v. Whittemore*, 15 Mass. 263; *Thayer v. Richards*, 19 Pick. (Mass.) 398; *Flanders v. Lamphear*, 9 N. H. 201.

shall become a part of his family or receive support at his table, and in the apartments occupied by him. A refusal to furnish such support in a separate room is a breach of the condition.¹

The condition of such a mortgage is broken by the mortgagor's declining to pay for the board of the mortgagee at a suitable place, although he make no special demand upon him for such support.²

A mortgage conditioned to provide a home in the house on the premises obliges the mortgagor, notwithstanding his removal from the premises, and the home becoming, by natural decay and without his fault, much dilapidated and not worth repairing, to provide a home there, or to furnish an equivalent elsewhere, but does not oblige him to supply food, clothing, or fuel. The fact that the mortgagor actually furnished such supplies for some time after making the mortgage does not affect this construction.³

It is not sufficient proof of a breach of contract to support a person during his life, to show that he left the house of the obligor and resided elsewhere for several years, but without at any time requesting him to fulfil his agreement, or in any way manifesting to him an intention or desire to hold him to the performance of the obligation.⁴

Where a mortgage by a son to his mother was conditioned "to provide a horse for said Margery to ride to meeting and elsewhere, when necessary; find her firewood for one fire, to be drawn and cut at the door, fit for use; give her a good cow, and keep said cow for her during the natural life of her the said Margery," it was held that the destruction of the house in which the mother lived with her son did not exempt him from the performance of the condition, and that he was bound to furnish the wood at such place as she should make her home, within a reasonable and convenient distance; that if the mortgagee was obliged to sell the cow in consequence of its not being properly kept, it was not necessary, in order to charge him with the cost of keeping a cow for the time subsequent to the sale, that the mortgagee should purchase a cow and tender her to the mortgagor to be kept.⁵

¹ *Hubbard v. Hubbard*, 12 Allen (Mass.), 586. ⁴ *Jenkins v. Stetson*, 9 Allen (Mass.), 128; *Thayer v. Richards*, 19 Pick. (Mass.), 398; *Rhoades v. Parker*, 10 N. H. 83.

² *Pettee v. Case*, 2 Allen (Mass.), 546.

³ *Gibson v. Taylor*, 6 Gray (Mass.), 310.

⁵ *Fiske v. Fiske*, 20 Pick. (Mass.) 499.

392. Who may perform the condition. — As already stated, a mortgage for support is in its nature a contract for personal services, and especially when by its terms the condition is to be performed by the mortgagor, his executors, and administrators, the duty cannot be transferred to a third person. Upon the death of the mortgagee, the condition must be kept by his heirs, executors, or administrators, and the mortgaged property subject to this duty cannot be disposed of by the administrator for the payment of the mortgagor's debts.¹

393. Who may foreclose. — A mortgage for the support of the grantee and his wife during their lives may be foreclosed by the administrator of the grantee, for a breach of condition occurring both before and after the grantee's death, although his widow does not join in the suit.²

But where a mortgage was conditioned to support the mortgagee during her lifetime, and there was no evidence of a breach of the condition, or of any demand for support other than what was furnished, it was held that the administrator of the mortgagee could not foreclose the mortgage for the benefit of persons who had boarded the mortgagee at the mortgagor's request. The mortgage was regarded as for the benefit of the mortgagee, and not for the benefit of those who might furnish her with support. Whatever claim they severally had for boarding and taking care of her at the mortgagor's request was against him personally, and not against her or her estate.³

Where a mortgage from a son to his parents, for their support, provides also for the use of a horse and buggy when they, or either of them, may desire it, there is a breach of the condition, upon a failure to furnish it on a reasonable demand by either of them alone, and either of them may have a separate action for damages. The provision is not joint but several. The damages allowed should cover the actual damage sustained. No decree can be made for future violations of this provision. It is impossible to determine in advance what damages may result from a failure to perform the condition.⁴

¹ *Eastman v. Batchelder*, 36 N. H. 141 ; ² *Marsh v. Austin*, 1 Allen (Mass.),
Bethlehem v. Annis, 40 N. H. 34 ; *Bryant* 235.

v. Erskine, 55 Me. 153. ³ *Daniels v. Eisenlord*, 10 Mich. 454. •

⁴ *Tucker v. Tucker*, 24 Mich. 426.

An instrument under seal but not acknowledged, in which the maker agrees to support his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them, "each and severally, a life lien or dower, or lien of maintenance for life," in real estate, is a mortgage; and upon a breach of the agreement, an action for possession of the premises may be sustained by the father alone.¹

394. Agreement for arbitration. — Under a mortgage to secure the performance of a bond or contract conditioned to support the mortgagee, a stipulation, "that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted" to three persons named, "and their decision shall be final," does not prevent an action for breach of condition by the mortgagee. This comes within the general principle, that an agreement for arbitration shall not deprive one of his legal remedies.²

395. Such a mortgage may be redeemed after breach.³ — Although there can be no judgment upon the mortgage for the non-performance of duties of a strictly personal nature, there may be for the non-performance of personal services to be performed by the mortgagor or by others,⁴ especially when the forfeiture has been accidental or unintentional, and not attended with irreparable injury, relief should be granted. In a case before the Supreme Court of Vermont,⁵ Redfield, C. J., said: "We must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform. . . . The case might occur where the refusal to afford daily support would

¹ *Gilson v. Gilson*, 2 Allen (Mass.), 115; and see *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299. ³ *Bryant v. Erskine*, 55 Maine, 153; *Bethlehem v. Annis*, 40 N. H. 43.

² *Hill v. More*, 40 Me. 515.

⁴ *Hoyt v. Bradley*, 27 Me. 242.

⁵ *Henry v. Tupper*, 29 Vt. 358, 375.

be wanton or wicked ; indeed, where it might proceed from murderous intentions even ; and it is even supposable, that the treatment of those who were the objects of the services should be such as to subject the grantor to indictment for manslaughter, or murder even, and possibly to ignominious punishment, and to death. To afford relief in such a case, for the benefit of the heirs, would be to make the court almost partakers in the offence.

“ And the case, upon the other hand, is entirely supposable, and of not infrequent occurrence, where, through mere inadvertence, a technical breach may have occurred in the non-performance of some unimportant particular, in kind or degree, where, through perhaps mere difference in construction, or error in judgment, one may have suffered a forfeiture of an estate at law of thousands of dollars in value, where the collateral service was not of a dollar's value, and attended with no serious inconvenience to the grantee. Not to afford relief in such case would be a discredit to the enlightened jurisprudence of the English nation and those American States which have attempted to follow the same model.”¹

¹ See, also, § 388 ; *Dunklee v. Adams* 20 Vt. 415, 421 ; *Soper v. Guernsey*, 71 Pa. St. 219.

CHAPTER X.

INSURANCE.

1. *Insurable Interests of Mortgagor and Mortgagee.*

396. An insurance against fire is a contract of indemnity with the assured against any loss he may sustain by the burning of the buildings. He must have some interest in the property insured, as owner, mortgagee, or otherwise, to make the contract effectual. If he never had any interest, or if at the time of the loss he had ceased to have any interest, he cannot claim anything under the contract; for he has suffered no loss. He may upon transferring his interest in the estate at the same time transfer the policy of insurance, and such transfer, being assented to by the underwriter, constitutes a new and original promise to the assignee to indemnify him. "But such undertaking," says Shaw, C. J., "will be binding, not because the policy is in any way incident to the estate or runs with the land, but in consequence of the new contract."¹

397. *Insurable interests.*—The mortgagor may insure the full value of the property, and recover the sum insured, if, at the time of the loss, he had the right of redemption; and it matters not that the mortgagee has taken possession of the premises.² Neither does it matter that his right in equity has been seized and sold on execution; his insurable interest continues so long as he has the right to redeem from such sale, and he may upon a loss recover the whole amount insured.³

The owner of an equity of redemption obtained a policy of

¹ *Wilson v. Hill*, 3 Met. (Mass.) 66, 69; Ill. 327; *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354.
Macomber v. Camb. Mut. F. Ins. Co. 8 Cush. (Mass.) 133; *Murdock v. Chenango Co. Mnt. Ins. Co.* 2 N. Y. 210.

² *Strong v. Manufacturers' Ins. Co.* 10 Pick. (Mass.) 40.

³ *Stephens v. Ill. Mut. Fire Ins. Co.* 43

insurance which contained a provision that he should not be entitled to recover any greater proportion of the loss than the amount insured might bear to the whole sum insured on the same property, without reference to the solvency or liability of other insurers. The owner had at the time of the loss another policy on his interest in another company; and the mortgagee had a policy on his interest in a third company. The jury were properly directed to apportion the loss between the companies having insurance upon the mortgagor's interest, without taking into account the value of the interest of the mortgagee insured by him; that is to say in apportioning the loss, the value of the equity of redemption was taken as a basis, and not the value of the entire property.¹

The insurable interest of the holder of the mortgage is measured by the value of his lien, if this does not exceed the value of the property.² He may recover according to his interest at the time of the loss. It does not matter that the mortgage is not valid at law, so long as it is valid in equity, as in the case of a mortgage by a husband to his wife, made for a just and valuable consideration.³

The mortgagee may insure as general owner without disclosing his interest unless this is inquired about, or he may insure his interest as mortgagee.⁴ When an inquiry is made respecting his interest, or when he undertakes to make a disclosure of his interest, his representations must be substantially correct or the policy will be void. But the mere fact of not disclosing his interest will not have that effect.

A mortgagee, who upon assigning the mortgage has indorsed the note, has an insurable interest in the mortgaged property. And that interest is sufficiently described by calling him "mortgagee," though the policy provide that the interest of the assured,

¹ *Tuck v. Hartford F. Ins. Co.* 56 N. H. 326.

² *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Kernochan v. N. Y. Bowery F. Ins. Co.* 5 Duer (N. Y.). 1; 17 N. Y. 428; *Tillou v. Kingston Mut. Ins. Co.* 7 Barb. (N. Y.) 570; *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 7 Lans. (N. Y.) 138; 55 N. Y. 343.

³ *Mix v. Andes Ins. Co. of Cincinnati*, 9 Hun (N. Y.), 397.

⁴ *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, per Mr. Justice Walker: "Neither reason, authority, nor the contract of assurance, so far as we can see, required the mortgagee, unless interrogated, to state the nature of his interest in the property."

whether as owner, trustee, mortgagee, lessee, or otherwise shall be truly stated.¹

Upon payment of the mortgage debt the mortgagee's insurable interest ceases; and upon part payment his insurable interest is the amount of the debt remaining unpaid.²

398. The mortgagor's interest remains insurable so long as he has a right to redeem the land. It continues after a sale of his equity of redemption on execution until his right to redeem from such sale is barred; and he may recover the insurance notwithstanding the sale.³ What the value of his redeemable interest may be is immaterial; the whole sum insured may be recovered, if this does not exceed the value of the property.⁴ In like manner the mortgagor's insurable interest continues after a foreclosure sale when a right to redeem exists after such a sale, so long as this right exists; and when there is no right of redemption after such sale, it would seem that he retains an insurable interest until the deed is delivered in pursuance of the sale. The purchaser has no right to the possession of the property until he receives the deed, and in the mean time the mortgagor has at least the right to occupy or to collect the rents; and until then, the sale is not complete nor is the right to redeem conclusively barred.⁵ Even after a mortgagor has conveyed his equity of redemption subject to the mortgage, or his grantee has assumed the payment of it, he retains an insurable interest, because he is liable upon the mortgage note to the holder of the mortgage, and is therefore interested in the preservation of the property charged with the payment of it.⁶ And even after an absolute conveyance, intended, however, as a security merely, and therefore in equity a mortgage, the mortgagor retains an insurable interest.⁷

¹ *Williams v. Roger Williams Ins. Co.* 107 Mass. 377.

² *Sussex Co. Insurance Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

³ *Strong v. Manufacturers' Ins. Co.* 10 Pick. (Mass.) 40.

⁴ *Strong v. Manufacturers' Ins. Co.* *supra*.

⁵ *Gordon v. Mass. F. & Marine Ins. Co.* 2 Pick. (Mass.) 249; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401, 404. In *McLaren v. Hartford F.*

Ins. Co. 5 N. Y. 151, it was held that the mortgagor could not recover for a loss happening after a sale under a decree of foreclosure, and before the delivery of the deed, having then no insurable interest; but this ruling is doubted in *Cheney v. Woodruff*, 45 N. Y. 98; and see *Brown v. Frost*, 1 Hoffm. (N. Y.) 41.

⁶ *Waring v. Loder*, 53 N. Y. 581; *Herkimer v. Rice*, 27 N. Y. 163.

⁷ *Hodges v. Tennessee Marine & F. Ins. Co.* 8 N. Y. 416.

399. When application should state incumbrance. — The existence of a mortgage upon a building, for the insurance of which application is made, is a material fact, if inquired about, and any misrepresentation in regard to the existence of the incumbrance or the amount of it will render void the policy.¹ Although the original amount of the mortgage be correctly stated, a failure to disclose the existence of accumulated interest to a large amount has been held to invalidate the policy.²

Although the policy be taken upon the interest of a mortgagee, a concealment of the existence of prior mortgages held by him, when their disclosure was called for, avoids the policy.³

When incumbrances are made material by an inquiry in relation to them, the applicant is not bound to disclose them. It is only necessary that he should have an insurable interest.⁴

2. Insurance by the Mortgagor for the Benefit of the Mortgagee.

400. Mortgagor's agreement to insure for benefit of mortgagee. — When the mortgage provides that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and he takes out a policy of insurance in his own name, which is not assigned to the mortgagee or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy;⁵ and if his mortgage is duly recorded, the covenant for insurance is regarded by some authorities as running with the land, and as giving notice of the right to others, so that no subsequent assignment of the policy would affect his

¹ Davenport v. N. E. Mut. F. Ins. Co. 6 Cush. (Mass.) 340. Stating the mortgage to be about \$3,000, when it was in fact \$4,000, has that effect. Hayward v. N. E. Mut. F. Ins. Co. 10 Ib. 444; and to like effect, Brown v. People's Mut. Ins. Co. 11 Ib. 280; void also when subject to a preëxisting mortgage not recorded; Packard v. Agawam Mut. F. Ins. Co. 2 Gray, (Mass.) 334; misrepresentation as to the existence of mortgage; Drape v. Charter Oak F. Ins. Co. 2 Allen (Mass.), 569; Bowditch Mut. F. Ins. Co. v. Winslow, 8 Gray (Mass.), 38; S. C. 3 Ib. 415; Falis v. Conway Mut. F. Ins. Co. 7 Allen (Mass.), 46; Towne v. Fitchburg Mut. F.

Ins. Co. 7 Ib. 51; Murphy v. People's Eq. Mut. F. Ins. Co. 7 Ib. 239; Smith v. Columbia Ins. Co. 17 Pa. St. 253.

² Jacobs v. Eagle Mut. F. Ins. Co. 7 Allen (Mass.), 132.

³ Smith v. Columbia Ins. Co. 17 Pa. St. 253.

⁴ Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442.

⁵ Vernon v. Smith, 5 Barn. & Ald. 1; In re Sands Ale Brewing Co. 3 Biss. 175; Carter v. Rockett, 8 Paige (N. Y.), 437; Cromwell v. Brooklyn F. Ins. Co. 44 N. Y. 42, 47, per Earl, C.; Thomas v. Vonkapff, 6 Gill & J. (Md.), 372; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442.

rights.¹ It is immaterial in this respect whether the policy existed at the time of the mortgage, or was afterwards taken out by the mortgagor.² The mortgagee in such case stands in the position of an assignee of a chose in action; he must enforce his rights in the name of the mortgagor, but his interest is sufficient to enable him to hold the proceeds against an attaching creditor or any subsequent assignee.

When the mortgagor, in a mortgage containing such a covenant, has procured a policy in his own name, and after a loss has delivered the policy to a third person in trust, to collect the insurance money, and pay from it the mortgage debt, the mortgagee thereupon has an equitable lien upon the policy which he may enforce, although the mortgagor afterwards obtains possession of the policy and fraudulently seeks to avail himself of it for his sole benefit.³

When a lessee has effected insurance under a provision in his lease that a policy shall be taken by him, and the money payable under it shall be applied in restoring the premises, the benefit of the insurance passes by a mortgage of his term without special mention of it.⁴

Where the agreement to keep insurance for the benefit of the mortgagee was merely verbal, but the mortgagor had acted upon it by obtaining such insurance, and his grantee having knowledge of the agreement subsequently surrendered this policy, and took another, which was not payable to the mortgagee, it was held that he was nevertheless entitled in equity to have the insurance money applied in payment of the mortgage debt.⁵

401. But if there is no covenant or agreement in the mortgage that the premises shall be insured for the benefit of the mortgagee, the mere fact that his mortgage covers the property insured, and the insured is personally liable for the debt, gives the mortgagee no corresponding claim upon the policy or the proceeds of it.⁶ His claim is then no better than that of any creditor of the

¹ In re Sands Ale Brewing Co. *supra*.

² Nichols v. Baxter, 5 R. I. 491.

³ Hazard v. Draper, 7 Allen (Mass.), 267.

⁴ Garden v. Ingram, 23 L. J. Ch. 478.

⁵ Miller v. Aldrich, 31 Mich. 408.

⁶ Lynch v. Dalzell, 4 Bro. Parl. Cases, 431; Neale v. Reid, 3 Dowl. & Ry. 158;

Powles v. Innes, 11 M. & W. 10; Carter v. Rockett, 8 Paige (N. Y.), 437; Wilson v. Hill, 3 Met. 66; Columbian Ins. Co. v. Lawrence, 10 Pet. 507; Carpenter v. Prov. Washington Ins. Co. 16 Pet. 495; Vandegraaff v. Medlock, 3 Port. (Ala.) 389; Hancox v. Fishing Ins. Co. 3 Sumn. 132; McDonald v. Black, 20 Ohio 185;

mortgagor. The policy is strictly a personal contract. It does not attach to the mortgage or to the realty. It has even been held, that a mere covenant by the mortgagor to effect insurance, without any stipulation that it is for the benefit of the mortgagee, or that the loss shall be paid to him, does not imply that the mortgagor shall apply the insurance money either in discharge of the mortgage debt or in restoration of the property.¹ A covenant to effect insurance is not without meaning, or without advantage to the mortgagee, although it be not either expressly or impliedly made for his benefit.

402. There is an equitable lien although the mortgage provides that the mortgagee himself may insure. — While a mortgagee, merely as such, has no interest in or claim to a policy of insurance effected by the mortgagor upon the property mortgaged for his benefit, and each has an insurable interest, and may effect separate insurance, yet, one insurance for the benefit of both is generally provided for by a covenant or condition that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the policy should then be taken out by the mortgagor, payable to the mortgagee in case of loss, or the policy should be assigned to him. But if the mortgagor afterwards takes out a policy in his own name and fails to assign it, or to make it payable to the mortgagee, such a contract in the mortgage creates an equitable lien in favor of the mortgagee, upon the money due, for a loss under such a policy, to the extent of his interest, although the mortgage contained a provision that the mortgagee, in default of the mortgagor's insuring, might take out a policy at the expense of the mortgagor and under the security of the mortgage for the premiums. The insurance company, and an assignee of the policy on notice of the rights of the mortgagee prior to the assignment, are subject to the equity.²

403. How far this equitable lien can affect another person who has subsequently acquired a specific assignment of the policy is a question not very definitely settled by the authorities.³ In

Plimpton v. Ins. Co. 43 Vt. 497; *Nichols v. Baxter*, 5 R. I. 491.

¹ *Lees v. Whiteley*, L. R. 2 Eq. 143.

² *Nichols v. Baxter*, 5 R. I. 491; and see *Miller v. Aldrich*, 31 Mich. 408.

³ *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 372; and see *Giddings v. SeEVERS*,

24 Md. 363.

the case cited, there was no occasion for the court to go farther than to hold that this equitable lien was binding upon the mortgagor, and after his decease upon his legal representatives. Mr. Justice Archer, however, in delivering the opinion of the court, expressed the view that if the insurance policy or fund had been passed over by the mortgagor, for a valuable consideration without notice, to a third person, the right of such third person would prevail because he would have an equity also; and having the possession, he would be protected, on the principle that the title of one who has both a fair possession and an equitable title shall be preferred to that of a mere equitable interest. "But here," he says, "the administrators have a mere naked legal right, subject to the mortgagee's equity. That the administrators represent the creditors cannot change the character of this equity of the mortgagee, or weaken its efficacy. The particular creditor and the general creditor stand in different attitudes. The former never trusted to the personal credit of the mortgagor, but trusted and looked to this particular fund, to satisfy his debt or give him security for it. The general creditors trusted to a personal credit alone. What has produced this fund? The advance of money upon its faith. . . . But again, the covenant is expressly for the benefit of the particular creditor, not for the benefit of the general creditors; and if they participate in it, they get that which they never could have looked to, and the extent to which they derive advantage from it, to the same extent do they take from that creditor who looked exclusively to it."

In another aspect of the case, the learned judge expressed views which go far towards sustaining the position that the lien created in favor of the mortgagee by the covenant for insurance is good against one who might afterwards take an assignment of the policy. "That this is a covenant running with the land can we think, scarcely be doubted. The covenants to repair and rebuild are admittedly so. And what is this, but in effect a modified covenant to repair and rebuild? The insurance is to be kept up, so that in case of loss by fire, the sum insured shall be immediately applied to rebuilding the property on the premises. Being of this character, it would run with the land, just as would an ordinary and absolute covenant to repair or rebuild; and running with the land, the record of the mortgage would be notice to all the general creditors, and they would, therefore, have no just pretensions

to participate in the fund, to the prejudice of the particular creditor."

404. Such lien valid against the mortgagor's assignee in bankruptcy. — This principle was acted upon in a recent case in the District Court of the United States for the Northern District of Illinois,¹ where it was held that the lien created by such a covenant is valid as against the mortgagor's assignee in bankruptcy; and there was an intimation that a specific assignment to a particular creditor would not have avoided the effect of the covenant. Mr. Justice Blodgett said: "My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor had insured, and his insurance enured at once to the benefit of the mortgagee. It is urged by way of argument in behalf of one creditor — the Union National Bank — that if all or part of these policies had been assigned to that creditor, they could have been held then as against the petitioner, and that the assignee, holding for the benefit of all creditors, occupies the same position; but this argument is fallacious, because it overlooks or ignores the fact that all creditors had notice of the petitioner's equitable right to this insurance money, and could acquire no valid interest therein as against him. Equity made this assignment the moment the insurance was effected if the mortgagor did not do it. . . . The lien is neither doubtful nor general, but is clear and specific. It is but carrying out the intent of the parties, and giving the mortgagee the security he had bargained for, and which he had given the whole world notice he was entitled to."

405. In Maine it is provided by statute² that a mortgagee of any real estate shall have a lien upon any policy of insurance against loss by fire procured thereon by the mortgagor, to take effect from the time he files with the secretary of the company a written notice, briefly describing the mortgage, the estate con-

¹ In re The Sands Ale Brewing Co. 3 statute annuls all provisions of a policy at variance with it. *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 322.

² Rev. Stat. 1871, c. 49, §§ 32-36. The

veyed, and the sum remaining unpaid thereon. If the mortgagor consents in writing filed with the secretary that the whole or a part of the sum secured by the policy shall be applied to the payment of the mortgage, the mortgagee's receipt shall be a sufficient discharge. If the mortgagor does not so consent, the mortgagee may, at any time within sixty days after a loss, enforce his lien by a suit against the mortgagor, and the company as his trustee, in which judgment may be rendered for what is found due upon the policy notwithstanding the time of payment of the whole sum secured by the mortgage has not arrived.¹ The amount recovered is first applied to the payment of the costs of suit and then to the payment of the mortgage debt; and the balance, if any, shall be retained by the company and paid to the mortgagor. When two or more mortgagees claim the benefit of this lien, their rights are determined according to the priority of their claims and mortgages by the principles of law. When a mortgagee claims the benefit of this lien, any policy of insurance previously or subsequently procured by him on his interest as mortgagee shall be void, unless it is consented to by the company insuring the mortgagor's interest.

406. Loss payable to the mortgagee.—When a policy is taken in the name of the mortgagor, but the insurance is made payable to the mortgagee in case of loss, the contract is with the mortgagor, and is for the insurance of his interest, and the mortgagee can recover only in case the mortgagor could have done so, unless the policy contains special provisions in favor of the mortgagee.² The making of the policy payable to the mortgagee is regarded as an appointment to receive any money which might become due from the insurers by reason of any loss which the mortgagor might sustain. It is still a contract to indemnify the mortgagor against a loss, and not a contract to indemnify the mortgagee. In a case before the court of Appeals of New York³ Mr. Justice Harris described the rights of the parties in such a

¹ A mortgagee has no lien upon a policy procured by the mortgagor which the insurers have in good faith settled before the expiration of sixty days after loss, and before any notice of the loss has been filed with the secretary, although such notice be afterwards filed

within the sixty days. *Burns v. Collins*, 64 Me. 215.

² *Merwin v. Star F. Ins. Co.* 7 Hun (N. Y.), 659.

³ *Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn*, 17 N. Y. 391.

case as follows: "The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers." It was accordingly held in this case that the mortgagor having parted with his interest in the property before the loss, the mortgagee, to whom the loss was payable, could not recover. Such a result is generally prevented by a provision in favor of the mortgagee, that no alienation by the mortgagor shall affect the mortgagee's right to recover;¹ and frequently protection is extended to the mortgagee so far as to prevent the invalidating of the policy by any act of the mortgagor or owner of the property insured.²

Aside from any saving provision in favor of the mortgagee, any act of the mortgagor, either in procuring the policy or in dealing with the property afterwards, which would avoid the policy as to him, will avoid it equally as to the mortgagee: as by a misrepresentation as to the use made of the property;³ or a violation of one of the provisions of the policy in procuring over-insurance.⁴

407. Equivalent to assignment. — The provision of a policy that the loss, if any, shall be paid to the mortgagee, operates to

¹ *Macomber v. Cambridge Mut. F. Ins. Co.* 8 Cush. (Mass.) 133.

² *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389.

³ *Merwin v. Star F. Ins. Co.* 7 Hun (N. Y.), 659.

⁴ *Buffalo Steam-engine Works v. Sun Mt. Ins. Co.* 17 N. Y. 401.

In CALIFORNIA it is provided that where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon

the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights. Civil Code, 1872. See 2541, 2542.

give the mortgagee precisely the same rights and interest in the policy which he would have if, without such words, the mortgagor had assigned the policy to him.¹

408. Who may bring suit.—When the policy is taken out by the mortgagor in his name, payable in case of loss to the mortgagee, the mortgagor may, with the assent of the mortgagee, sue on the policy in his own name. The mortgagor in such case is the party for whose benefit the insurance really operates, whether payment be made to himself or to the mortgagee.² Without such assent, so long as the mortgage debt remains unpaid, the action should be brought by the mortgagee in his own name, or he should be joined as a party.³ The contract of insurance in such case is with the mortgagor, notwithstanding the loss is payable to the mortgagee. This direction in the policy is not an assignment of it, and although it is assented to by the insurer, the contract with the mortgagor is not thereby merged or extinguished.⁴ In an action on such a policy by the mortgagor, the insurer may plead payment to the mortgagee as performance. The rights of the mortgagee and of the insurers as well may be protected in all cases by a payment of the money into court.⁵

When a mortgagor effects an insurance, payable in case of loss to the mortgagee, the former holds the legal title, and may maintain an action on the policy for the use of the mortgagee.⁶ The subsequent payment of the mortgage debt does not prevent a recovery against the insurance company; but the mortgagor may still recover in the name of the mortgagee if necessary, or in his own name.⁷

At common law the assignee of a policy of insurance cannot maintain an action upon it in his own name, and unless author-

¹ *Grosvenor v. Atlantic F. Ins. Co.* of Brooklyn, 5 Duer (N. Y.), 517; 17 N. Y. 395; *Ennis v. Harmony F. Ins. Co.* 3 Bosw. (N. Y.) 516; *Luckey v. Gannon*, 37 How. (N. Y.) Pr. 134, 138.

² *Turner v. Quiney Ins. Co.* 109 Mass. 568; *Farrow v. Commonwealth Ins. Co.* 18 Pick. (Mass.) 53; *Patterson v. Triumph Ins. Co.* 64 Me. 500; *Jackson v. Farmers' Ins. Co.* 5 Gray (Mass.), 52.

³ *Ennis v. Harmony Fire Ins. Co.* 3 Bosw. 516; *Frink v. Hampden Ins. Co.* 45

Barb. (N. Y.) 384; 31 How. Pr. 30; *Rous- sel v. St. Nicholas Ins. Co.* 41 N. Y. Superior Ct. 279.

⁴ *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, and cases cited; *Grosvenor v. Atlantic Ins. Co.* 17 N. Y. 391.

⁵ *Martin v. Franklin F. Ins. Co.* *supra*.

⁶ *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

⁷ *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447.

ized so to do by general law or by the act incorporating the insurance company, the suit must be in the name of the insured for the use of the assignee.¹

409. Mortgagee is bound to receive the whole insurance, and apply it to the debt. — Where a policy of insurance is taken out by the mortgagor, payable to the mortgagee in case of loss, the insurer is bound to pay the whole loss to the mortgagee, who is holden to apply the amount received, so far as is necessary to discharge the mortgage; and in case the mortgage debt has been previously paid, the mortgagee would receive the sum paid for the use of the mortgagor. In such case, the continued existence of the mortgage debt is not essential to a recovery for the benefit of the mortgagor, because the policy is his, and is upon his interest, which is in no way diminished by the discharge of the mortgage.² If the policy contain a provision that "No sale of the property shall affect the right of the mortgagee to recover in case of loss, under this policy," and a sale be made before a loss occurs, the mortgagee is still bound to recover the amount from the insurers and to apply the avails first to the discharge of the mortgage debt, and the surplus to the benefit of the mortgagor; and the insurers, if they have taken a transfer of the mortgage upon paying the loss, stand in no better position than the mortgagee, as they have full knowledge of the existence of the policy and of its provisions; and the purchaser of the equity of redemption is entitled to the benefit of the money paid on the loss, and may redeem upon paying the balance due upon the mortgage after deducting the amount payable for the loss.³

If it be provided in the mortgage that the mortgagor shall insure in a certain sum, for the benefit of the mortgagee, or that the mortgagee may cause the property to be insured at the expense of the mortgagor, and that the premium shall be covered by the mortgage security, then in effect the policy is furnished by the mortgagor, and any money recovered under it enures to him in going towards paying his debt to the mortgagee. The

¹ New England F. & M. Ins. Co. v. per Shaw C. J.; Suffolk F. Ins. Co. v. Wetmore, 32 Ill. 221; Illinois F. Ins. Co. v. Stanton, *supra*. Boyden, 9 Allen (Mass.), 123; Clark v. Wilson, 103 Mass. 221; Waring v. Loder,

² Concord Union Mut. Fire Ins. Co. v. 53 N. Y. 581.

Woodbury, 45 Me. 447; King v. State ³ Graves v. Hampden Fire Ins. Co. 10 Mutual Fire Ins. Co. 7 Cush. (Mass.) 1, Allen (Mass.), 281.

mortgagee receives the proceeds to apply in the first place to the payment of the mortgage debt, and then he is trustee for the mortgagor for any balance left in his hands.¹ If in such case the mortgagee pays the premium, he may charge the amount in his account against the mortgagor. But in the absence of any such contract the mortgagee could not charge to the mortgagor a premium paid by him for insurance. Any insurance obtained by him on his own interest is for his own benefit. The fiduciary relation existing between the mortgagee and mortgagor, in some limited matters, does not extend to such an insurance of the mortgagee's interest. Before entry for condition broken, that relation is a matter of contract.²

410. When debt not due.—When the mortgaged property is insured for the benefit of the mortgagee such insurance is collateral to the debt, and money recovered from the insurance is still collateral and cannot be applied by the mortgagee to payment of the mortgage debt without the consent of the mortgagor if the debt be not due, and the mortgagee has no right to demand payment, or upon default to convert the securities. If under such circumstances the money received from the insurance be paid by the mortgagee to the mortgagor, for restoring the premises so as to make them as valuable as before the fire, a second mortgagee has no equity to have the amount so received applied for his benefit in reduction of the debt secured by the first mortgage.³

411. Insurers under such policy have no claim to be subrogated.—The insurers upon paying a loss upon a policy taken out by the mortgagor payable to the mortgagee in case of loss, or assigned to him, have no claim to be subrogated to the rights of the mortgagee.⁴ If after such a loss the mortgagee brings suit in the name of the assured upon the policies and obtains judgment, but, instead of enforcing the judgment, enforces payment

¹ *Fowley v. Palmer*, 5 Gray (Mass.), 49; *Mix v. Hotchkiss*, 14 Conn. 32.

² *Dobson v. Land*, 8 Hare, 216; 4 De G. & S. 575; *Bellamy v. Brickenden*, 2 Jo. & Hem. 137; *King v. State Mutual Fire Ins. Co.* 7 Cush. (Mass.) 1.

³ *Gordon v. Ware Savings Bank*, 115 Mass. 588.

⁴ *Kernochan v. N. Y. Bowery Ins. Co.* 17 N. Y. 428; 5 Duer, 1; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173. And see, also, *Washington Fire Ins. Co. v. Kelly* 32 Md. 421, as to right of subrogation upon loss pending contract of sale.

of the mortgage by foreclosure, the assured is entitled to the benefit of the judgment against the insurers, who have no claim to be relieved from the judgment.¹

412. Agreement to assign to insurers. — The effect of an insurance procured in this way is not qualified by a clause in the policy, that in case of loss the assured shall assign to the insurers an interest in the mortgage equal to the amount of the loss paid; or by an assignment made in pursuance of such a provision, or of any subsequent agreement between the parties. Under such an assignment the amount of the loss must be applied in reduction of the mortgage debt, and the insurers can hold the mortgage only for the balance of the debt remaining after such payment.²

Policies of insurance now generally provide that in case of the payment of any loss to a mortgagee, whose interest is insured, the insurers shall be subrogated to that extent to his rights under the mortgage.³

413. When a policy protects the mortgagee against the acts of the owner of the property in derogation of the policy, and provides for the subrogation of the insurers to the rights of the mortgagee, in case of payment to the mortgagee for a loss under the policy which the insurers would not have been liable to pay to the owner, the contract, from being primarily one insuring the mortgagor, and making the mortgagee an equitable assignee, is by these special provisions, upon the happening of certain events, resolved in effect into an insurance of the interest of the mortgagee, as such, and into a personal contract with the mortgagee, in which the mortgagor has no interest.⁴ The insurance money, when paid under such a policy to the mortgagee, is not a payment to that extent of the mortgage debt, but is in effect a payment by the insurers towards the purchase of the mortgage.

When the policy is made payable to a mortgagee he is generally protected against the acts of the owner of the property by a provision of the policy that it shall not be forfeited by any alienation

¹ *Robert v. Traders' Ins. Co.* 17 Wend. (N. Y.) 631; reversing S. C. 9 Ib. 404. ² *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389.

³ *Foster v. Van Reed*, 5 Hun (N. Y.), 321; *Waring v. Loder*, 53 N. Y. 581; ⁴ *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389.

Davis v. Quincy Mut. F. Ins. Co. 10 Allen, Mass. 113.

or other act on his part. If a policy so providing also contain a further provision that in case of a payment of the loss to the mortgagee, the insurer shall be entitled to an assignment of the mortgage, upon the happening of a loss and the assignment of the policy to the insurers, it will be a valid security in their hands if the mortgagor or owner of the property, to whom the policy was issued, has alienated the property prior to the loss, so that the policy has become void as to him, though saved from forfeiture as against the mortgagee. The principal party insured then has no right to claim the sum paid upon the loss as a payment on the mortgage debt.¹

414. When mortgagee may charge for insurance obtained by him. — Insurance effected by a mortgagee upon the mortgaged estate, without any provision authorizing him or obligating the mortgagor to do so, cannot be charged to the mortgagor.² But if the mortgage contains a condition that the mortgagor shall “keep the buildings standing on the land aforesaid insured against fire, in a sum not less than twenty-five hundred dollars, for the benefit of the said mortgagee,” and the mortgagor fails to insure, the mortgagee may effect insurance, and is entitled to credit for the premiums paid by him.³ The mortgagor, having failed to comply with his contract, cannot take advantage of his own wrong and decline to pay the premium. The condition that the mortgagor should insure distinguishes the case from that class of cases where the mortgagee insures his own interest in the mortgaged premises; such insurance he must effect at his own expense. Then he is not holden to account for the proceeds. But when the mortgage gives the mortgagee the right to insure at the expense of the mortgagor, and he does so, and charges premium to the mortgagor, the amount received from the insurance must be accounted for towards the payment of the mortgage debt. Although it may be difficult to prove that the mortgagee in any particular case effected the insurance under the provision of the mortgage and at the expense of the mortgagor, so that he is accountable for the proceeds,

¹ Springfield Fire & Marine Ins. Co. v. Allen, *supra*. 259; Faure v. Winans, Hopk. (N. Y.) Ch. 283.

² Dobson v. Land, 8 Hare, 216; 4 De G. & S. 575; 3 Bennett's F. Ins. Cases, 147, n. Saunders v. Frost, 5 Pick. (Mass.) 549. ³ Fowley v. Palmer, 5 Gray (Mass.), 549. The insurance in this case was payable to the mortgagee “for whom it may concern.”

the difficulty is one brought upon the mortgagor by his own failure to perform his contract ; ¹ and if he has no such proof he must take the mortgagee's word for it.

The mortgagor will not be allowed for insurance effected by himself, in the absence of any stipulation in the mortgage that the mortgagor shall keep the property insured for the mortgagee's benefit, or that premiums of insurance paid by the mortgagee shall be a charge upon the property.²

415. Rule is the same under a condition to keep insurance. The rule is the same when the agreement respecting insurance is not in the form of a direct covenant to keep the premises insured, but is a part of the condition of the mortgage ; as when the condition was,³ that if the grantor should repay the loan, "and, until such payment, keep the buildings standing on the land aforesaid insured against fire, in a sum not less than \$250, for the benefit of the mortgagee, and payable to him in case of loss, at some insurance office approved by him ; or, in default thereof, shall, on demand, pay to said mortgagee all such sums of money as the said mortgagee shall reasonably pay for such insurance, with interest," then the deed should be void.

In Connecticut it is provided by statute that premiums paid by the mortgagee of any property, for insuring his interest therein against loss by fire, shall be deemed to be a part of the mortgage debt, and shall be refunded to him before he can be required to release his title.⁴

416. Mortgagee charging for insurance liable as insurer. — A mortgagee who charges the mortgagor with the premiums for an insurance for a certain time as part of the loan, and undertakes to procure the insurance, is bound to keep the policies alive during that period, and he is himself liable as an insurer if in consequence

¹ Per Chief Justice Shaw, in *Fowley v. Palmer*, *supra*.

² *Clark v. Smith*, Saxt. (N. J.) 121, 137 ; *Saunders v. Frost*, 5 Pick. (Mass.) 259 ; *Faure v. Winans* ; *Hopk.* (N. Y.) Ch. 283 ; *Pierce v. Fauce*, 53 Me. 351.

³ *Nichols v. Baxter*, 5 R. I. 491. The form of mortgage in this case is the ordinary form used in Massachusetts.

⁴ Gen. Stat. 1875, p. 358. See English statute providing for adding to the principal sum secured premiums paid by the mortgagee for insurance, which, by the terms of the deed, should be obtained by the mortgagor, 23 & 24 Vict. c. 145, §§ 11, 12.

of his neglect to pay the premiums the policies expire.¹ The extent of the liability is the same as an insurance company's would have been had the policies been continued by the payment of the premiums.

417. A return premium upon a policy procured by the mortgagor and assigned to the holder of a mortgage, which is subsequently paid by a purchaser of the equity of redemption, in accordance with his agreement with the mortgagor to assume and pay it, belongs to the mortgagor, and he may recover the amount of it from any one else who collects it.²

3. *Insurance by the Mortgagee.*

418. When insurance obtained by mortgagee is presumed to be under the covenant for insurance. — When the mortgage contains the usual covenant for insurance on the part of the mortgagor, and an agreement that, in case of his failure to do so, the mortgagee or his representatives may make such insurance, and the mortgage shall secure the repayment of the premiums, an insurance effected by the mortgagee is presumed to be under this authority, although it be “on his interest as mortgagee.”³ The policy taken under such provision in the mortgage is farther security of the mortgage debt in the hands of the mortgagee, and the insurance money, when paid, must be applied in satisfaction of that debt. In a case before the Court of Appeals in New York,⁴ upon a policy effected under such a provision in the mortgage, Mr. Justice Andrews said: “The authority given in the mortgage was an authority to the mortgagee to procure an insurance for the benefit of both parties. This is the fair interpretation. It was immaterial to the mortgagor whether the insurance was in his name or in the name of the mortgagee, if the avails of it in case of loss should apply in reduction of the debt. The mortgagee had no interest to procure an insurance limited to his own protection merely, where the expense was to be paid by the other party and was secured on the land.” There is an implied obligation arising from the procuring of the insurance upon the request of

¹ Soule v. Union Bank, 45 Barb. (N. Y.) 111; 30 How. Pr. 105.

³ Foster v. Van Reed, 5 Hun (N. Y.), 321.

² Merrifield v. Baker, 9 Allen (Mass.), 29; Felton v. Brooks, 4 Cush. (Mass.) 203.

⁴ Waring v. Loder, 53 N. Y. 581.

the mortgagor, or at his expense, that the insurance money when paid shall be applied to the mortgage debt.¹ Whenever the insurance has been effected at the request, or by the authority of the mortgagor, or at his expense, or under circumstances that would make him chargeable with the premium, he is entitled to have the money paid on the policy applied to the extinguishment of his debt.² The insurance having been paid for by the mortgagor, though taken in the name of the mortgagee as if absolute owner, the fact that the mortgagor has paid the debt secured by the mortgage does not prevent a recovery for a loss against the insurers. The mortgagor in such case is the beneficial party, and has the right to recover in the name of the mortgagee.³

419. Insurance of mortgagee's interest is not an insurance of the mortgage debt. — It has been said in some cases that an insurance of a mortgage interest is an insurance of the mortgage debt, or at least an indemnity against the loss of that debt by a loss or damage to the property mortgaged, and therefore that if the mortgaged property after the loss is still enough in value to pay the debt, there has been in effect no loss.⁴ This subject was fully examined by Mr. Justice Folger, in a recent case before the Court of Appeals in New York,⁵ and he clearly shows that the

¹ *Holbrook v. Am. Ins. Co.* 1 Curtis, 193; *Buffalo Steam-engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 406; *Clinton v. Hope Ins. Co.* 45 N. Y. 454.

² *Honore v. Lamar F. Ins. Co.* 51 Ill. 409.

³ *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442.

⁴ *Smith v. Col. Ins. Co.* 17 Pa. St. 253, per Gibson, J.; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385, 397, per Chancellor Walworth; *Carpenter v. Providence, &c. Ins. Co.* 16 Peters, 495, 501, per Story, J.; *Kernochan v. N. Y. Bowery Ins. Co.* 17 N. Y. 428, per Strong, J.; *Mathewson v. Western Assurance Co.* 4 L. Can. Jur. 57.

⁵ *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343, 357, per Folger, J. "Fire underwriters in these days, in this state, are the creatures of statute, and have no rights, save such as the state gives to them. They may agree

that they will pay such loss or damage as happens by fire to property. They are limited to this. It was not readily that it was first held that they could agree, with a mortgagee or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it; how then can he insure it? was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt, and for indemnification against its loss; but still re-

insurance of a mortgage interest is not an insurance of the debt, but of the interest of the mortgagee in the property upon the safety of which depends his security, and that upon the happening of a loss the insurer is bound to make good the loss without regard to the value of the property remaining.

420. Insurer subrogated to rights of mortgagee. — It being settled that an insurance made by a mortgagee of his own interest, at his own expense, and upon his own motion, is an insurance of his interest in the property, and not of the debt secured, and that the insurers are liable to pay him the whole amount of the damage to the property, it remains to be considered whether either the mortgagor can claim that the payment shall be applied

mained one upon the property, and against loss or damage to it. It is doubtless true as is said by Gibson, J., in 17 Penn. *supra*, that in *effect* it is the debt which is insured. It is only as an effect, however; an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property, creates that interest. The agreement is usually, as it is in fact in this case, for insuring, from loss or damage by fire, the property. The interest of the mortgagor is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, or so safe, or so valuable, as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium.

“To say that it is the debt which is insured against loss, is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts.

If they are, they may insure against the insolvency of the debtor. No one will contend this; and it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire. This is but coming to our position; that it is the property which is insured against the loss by fire, and the protection of the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability, irrespective of the value of the property destroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer by loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance.”

in discharge of his debt, or the insurers can claim the mortgage security by assignment or subrogation.

In the first place, it is the undisputed doctrine of all the cases that the mortgagor himself can claim no benefit from such insurance.¹ The question in dispute is, whether upon payment of the loss under such a policy, the insurer shall be subrogated to the security held by the mortgagee, or whether he may, after having collected the insurance money, proceed to collect the mortgage debt from the mortgagor, and the property mortgagee.

The general rule and the weight of authority is, that the insurer is thereupon subrogated to the rights of the mortgagee under the mortgage. This is put upon the analogy of the situation of the insurer to that of a surety.² The mortgagor and mortgagee have each an insurable interest. If the mortgagee obtain insurance on his own account, and the premium is not paid by or charged to the mortgagor, he cannot claim the benefit of a payment of the policy; but the insurer is entitled to be subrogated to the claim of the mortgagee, and may recover upon the note.³

Upon this principle it has been held that, upon payment of the mortgage debt, the equitable liability of the mortgagee to the mortgagor for the money received from the insurers is a sufficient consideration to support a promise by the mortgagee to allow the amount secured by him upon the mortgage debt, and that an action may be maintained on such promise.⁴

421. King v. State Mutual Fire Insurance Co. — If insurance be effected upon the interest of the assured as mortgagee, at his own expense, the insurers, upon payment of a loss and tender of the balance due on the mortgage, have in some courts been held not entitled to have the mortgage assigned to them, or to be

¹ *Dobson v. Land*, 8 Hare, 216; 4 De G. & Sm. 575; *Bellamy v. Brickenden*, 2 Johns. & Hem. 137; *Russell v. Southard*, 12 How. 139, 157; *White v. Brown*, 2 Cush. (Mass.) 412; *Fowley v. Palmer*, 5 Gray (Mass.), 549; *Clark v. Wilson*, 103 Mass. 219, 221; *Ely v. Ely*, 80 Ill. 532.

² *Honore v. Lamar F. Ins. Co.* 51 Ill. 409; *Sussex Co. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 555; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442.

³ *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343; *Kernochan v. N. Y. Bowery F. Ins. Co.* 17 N. Y. 428; *Etna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 397; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Sussex Co. Insurance Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Callahan v. Linthicum*, 43 Md. 97, and cases cited.

⁴ *Callahan v. Linthicum*, 43 Md. 97, *Alvey and Grason, JJ.*, dissenting.

subrogated to the rights of the assured under the mortgage, either at law or in equity. The mortgagee's insurance is not an insurance of the debt, although the amount of that is the measure of his insurable interest in the property.¹ The insurer has no interest in the mortgage debt; and there is no privity between him and the mortgagor. Neither can the mortgagor claim any part of the money so recovered as a payment of the mortgage debt, in whole or in part; but he must still pay the whole mortgage debt to the mortgagee.² If, however, the mortgage debt was paid, and the

¹ *King v. State Mutual Fire Ins. Co.* 7 Cush. (Mass.) 1. In this case Chief Justice Shaw said:—

“The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of the debt. He afterwards secures the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt?”

“He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity of contract between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

“But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into

consideration, in other words, the computed chances of loss, the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. . . . Suppose—for, in order to test a principle, we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent.; the creditor may pay a sum, equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premium paid.

“What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally secured in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent.”

See, also, *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.), 123; *Foster v. Equitable Mut. F. Ins. Co.* 2 Gray (Mass.), 216; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Cushing v. Thompson*, 34 Me. 496; *Clark v. Wilson*, 103 Mass. 221.

² *King v. State Mutual Fire Ins. Co.* *supra*; *White v. Brown*, 2 Cush. (Mass.)

mortgage discharged before the loss occurred, the mortgagee's insurable interest having terminated, he has no claim to recover.

4. *A Mortgage is not an Alienation.*

422. With reference to the usual provision in the policy of insurance, that it shall become void upon an alienation of the property insured, or upon any transfer or change of title, it is held that a mortgage is not an alienation or change of title until foreclosure is complete.¹

423. If, however, the mortgage is by a deed absolute in form, this operates as a transfer or change of title, and puts an end to an insurance conditioned to be void in that event.²

Some courts, however, hold that a conveyance which equity will treat as a mortgage does not terminate the interest of the assured, or make void the policy under the alienation clause.³ If there be a written defeasance which is seasonably recorded, the two instruments constitute a mortgage as effectually as if the defeasance were contained in the deed, and there can be no pretence that there is an absolute conveyance.⁴ But if the defea-

412; *Cushing v. Thompson*, 34 Me. 496; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Bean v. Atlantic & St. Lawrence R. Co.* 58 Me. 82.

¹ *Jackson v. Mass. Mut. Fire Ins. Co.* 23 Pick. (Mass.) 418; *Rice v. Tower*, 1 Gray (Mass.), 426; *Pollard v. Somerset Mut. Fire Ins. Co.* 42 Me. 221; *Smith v. Monmouth Mut. Fire Ins. Co.* 50 Me. 96; *Shepherd v. Union Mut. Fire Ins. Co.* 38 N. H. 232; *Dutton v. N. Eng. Mut. Fire Ins. Co.* 9 Fost. (N. H.) 153; *Rollins v. Columbian Mut. Fire Ins. Co.* 5 Ib. 200; *Folsom v. Belknap Co. Mut. Fire Ins. Co.* 10 Ib. 231; *Conover v. Mut. Ins. Co. of Albany*, 3 Denio, 254; S. C. 1 Comst. (N. Y.) 290; *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50; *contra*, see *McCulloch v. Indiana Mut. Fire Ins. Co.* 8 Blackf. (Ind.) 50; *Indiana Mut. Fire Ins. Co. v. Coquilard*, 2 Ind. 645.

² *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279. "There may be a transfer or

change of title without a sale. Should A. convey a piece of property to B. to hold in secret trust for him, there would be a transfer or change of title from A. to B., but there would be no sale of the property or an actual parting with it to B. for a valuable consideration, although the conveyance on its face would import a sale from A. to B. And if the trust, instead of being secret, appeared on the face of the conveyance, there would still be a change of title. The title would no longer be in A. but in B., his grantee. We think such a conveyance would clearly come within the condition of the policy and put an end to the insurance."

³ *Holbrook v. American Ins. Co.* 1 Curtis C. C. 193; *Hodges v. Tennessee Marine & Fire Ins. Co.* 8 N. Y. 416; and see *Tittmore v. Vt. Mut. Fire Ins. Co.* 20 Vt. 546.

⁴ *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

sance be not recorded, the deed is an alienation which will avoid the policy.¹

424. Entry to foreclose. — Where a policy provided that “the entry of a foreclosure of a mortgage” should be deemed an alienation of the property, and the company should not be holden for any loss occurring afterwards, it was held that this did not mean an actual and complete foreclosure, but had reference to an entry by the mortgagee upon a breach of condition for the purpose of foreclosure. Under the system of foreclosure in use in Massachusetts, such entry duly recorded, and followed by possession for three years, accomplishes a foreclosure.²

The court say: “The first step towards foreclosure is the manifestation of the intent to foreclose, which is to be indicated in such manner as the law points out, accompanied with a formal registration in the public records. It is very manifest, as we think, that the words ‘the entry of a foreclosure,’ as used in the policy, are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. The policy provides not merely for the transfer but the change of title, and the insurer may very naturally have considered an entry for foreclosure as a material change in the title of the assured and in his relation to the property. The parties in their contract have taken pains to avoid saying simply that ‘the foreclosure of a mortgage’ shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them.”

425. But when the title becomes absolute in the mortgagee by a strict foreclosure, or by a foreclosure effected by entry and possession, or when the title passes to another by a sale under a power contained in the mortgage, or by a sale under a decree of court in a foreclosure suit, the transfer is then complete, and the change of title is an alienation within the terms of the policy of insurance.³

¹ *Tomlinson v. Monmouth Mt. F. Ins. Co.* 8 Cush. (Mass.) 133; *McLaren v. Hartford Fire Ins. Co.* 5 N. Y. 151; *Mt.*

² *McIntire v. Norwich Fire Ins. Co.* 102 Mass. 230. *Vernon Manuf. Co. v. Summit Co. Mut. Fire Ins. Co.* 10 Ohio St. 347.

³ *Macomber v. Cambridge Mut. F. Ins.*

In case, however, the foreclosure is effected by the mortgagor for the benefit of the mortgagee who signs the premium note and pays the assessments, foreclosure is not an alienation, if the mortgagee thereby obtains absolute title to the property, as he is already the person liable under the contract of insurance.¹

426. Alteration of ownership. — But a mortgage is a violation of a condition against an “alteration of ownership,”² as also of a condition against a sale or alienation “in whole or in part.”³

A conveyance and mortgage back to secure the purchase money is such an alienation as will avoid a policy upon the property, although it is provided that the mortgagee shall retain possession until the purchase money is paid.⁴ But a conveyance by the insured, with a simultaneous reconveyance in trust for the first grantor, is held not to be such an alienation or transfer.⁵ And so if the sale and reconveyance constitute merely a conditional sale, they are regarded as parts of one entire contract, and are held not to be such an alienation as will avoid the policy.⁶

427. After assignment of policy with consent. — If the mortgagor has already assigned the policy with the consent of the insurers to the mortgagee, his subsequent transfer of the equity of redemption is no breach of the stipulation in the policy against alienation, so far as the assignee is concerned.⁷

This view has been criticised in some courts as contrary to the principle of public policy, that no man shall be allowed to bargain for an advantage to arise from the destruction of property.⁸

¹ *Bragg v. N. E. Mut. Fire Ins. Co.* 5 Fost. (N. H.) 289.

² *Edmonds v. Mut. Safety Fire Ins. Co.* 1 Allen (Mass.), 311.

³ *Abbott v. Hampden Mut. Fire Ins. Co.* 30 Me. 414; *Bates v. Com. Ins. Co.* 2 Cincinnati Supr. Ct. (Ohio) 195.

⁴ *Tittmore v. Vt. Mut. Fire Ins. Co.* 20 Vt. 546.

⁵ *Morrison v. Tenn. Mar. & Fire Ins. Co.* 18 Mo. 262.

⁶ *Tittmore v. Vt. Mut. Fire Ins. Co.* *supra*.

⁷ *Foster v. Equitable Mut. Fire Ins. Co.* 2 Gray (Mass.), 216; *Fogg v. Middlesex Mut. Fire Ins. Co.* 10 Cush. (Mass.) 337; *Bragg v. N. Eng. Mut. Fire Ins. Co.* 5 Fost. (N. H.) 289; *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 Barb. (N. Y.) 254.

⁸ *Kernochan v. N. Y. Bowery F. Ins. Co.* 17 N. Y. 428.

CHAPTER XI.

FIXTURES.

1. *Rules for determining what Fixtures a Mortgage covers.*

428. In general. — A mortgage of real property, as a general rule, carries as part of the security all fixtures belonging to the realty, without any special mention of them being made in the conveyance. In determining what chattels when annexed to the land become fixtures, and therefore bound by a mortgage, very much the same rules apply as between a grantor and his grantee in case of an absolute conveyance;¹ but although in the case of a deed the construction is generally more favorable to holding that things attached to the land are part and parcel of the realty, and no longer personalty, yet in the construction of a mortgage even greater favor in the same way seems to be shown the mortgagee. The reason seems not to be far away. When the question arises under a mortgage, the mortgagor always has the right to redeem, and in this way to gain the benefit of any addition made to the realty; and any one claiming under him has only his rights, and acquires these with full knowledge of the incumbrance and of the condition of the property.

All buildings and other fixtures annexed to the freehold become part of it, and enure to the benefit of those who are entitled to it; both to the mortgagee as an increased security for his debt, and to the mortgagor to the same extent as enhancing the value of his equity of redemption. The latter can obtain the full benefit of all improvements he has made by paying his debt and regaining his estate by redemption. This rule as well as the exceptions to it is applicable to deeds of trust equally with mortgages.²

¹ Longstaff v. Meagoe, 2 Adol. & El. Smith (N. Y.), 273; Robinson v. Preswick, 167; Main v. Schwarzwealder, 4 E. D. 3 Edw. (N. Y.) Ch. 246.

² Graeme v. Cullen, 23 Gratt, 266.

429. The intention with which fixtures are annexed largely determines the right to them.—The intention with which an article of personal property is attached to the realty, whether for temporary use or for permanent improvement, has within certain limits quite as much to do with the determination of the question whether it has thereby become a permanent fixture, as has the way and manner in which it is attached.¹ If it is something necessary for the proper enjoyment of the estate it may be presumed that it was annexed for its permanent improvement, and therefore that it goes to the benefit of the mortgagee. The fixtures may be so adapted to the building in which they are placed, and to the purposes for which the building is to be used, as to show clearly that they were designed to be permanent. Such for instance are the fixtures in a manufactory necessary for furnishing the motive power, or for the proper carrying on of the business.² A mortgage of a machine-shop includes a lathe and other fixtures necessary for the prosecution of the business of the shop.³ A mortgage of a building erected for a steam saw-mill, and which would be of little use for any other purpose, embraces also the boilers, engines, saws, gearing and machinery necessary for the working of the mill and without which it would be incomplete.⁴ Boilers, engines, shafting, and steam-pipes for heating a large building, are covered by a mortgage of the realty.⁵ In a case before the Irish Chancery Court the Lord Chancellor said: "I find that all the cases come round to the same question, namely, what are fixtures? Now, it appears to me that this does not at all depend upon the power of removal; the owner in fee has the right to remove all fixtures; the tenant has a right to remove fixtures erected for trade purposes; but until they are severed they are still fixtures, and as between mortgagor and mortgagee they are not removable, though the mortgagor remain in possession. I therefore think that the possibility of removal is not so much the test as the nature of the article."

¹ *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260; *Hill v. Wentworth* 28 Vt. 429, per Bennett, J.; *Bishop v. Bishop*, 11 N. Y. 123, as to hop-poles; *Voorhees v. McGinnis*, 54 N. Y. 324; *Potter v. Cromwell*, 40 N. Y. 287.

² *Millikin v. Armstrong*, 17 Ind. 456;

Crane v. Brigham, 3 Stockt. (N. J.) 29; *Keve v. Paxton*, 26 N. J. Eq. 107.

³ *Hoskin v. Woodward*, 45 Pa. St. 42.

⁴ *Brennan v. Whitaker*, 15 Ohio St. 446; *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260.

⁵ *Ex parte Montgomery, &c.* 4 Irish Ch. N. S. 520.

The principles by which to determine whether a personal article after being attached to the realty still remains a chattel are two : first, the mode and degree of the annexation ; and second, the purpose of it ;¹ the first cannot of course be defined with any exactness. The modes of annexation may be almost as numerous as the instances that occur. The degrees of physical force with which the chattels are annexed may be as many as the modes of annexation. The degree may be very slight and yet be sufficient to make the article a fixture and part of the realty. As the result of the numerous cases, it is safe to say that this is the less important part of the criterion. If the intent is manifest that the chattel is attached to the estate for its permanent improvement, the mode and degree in which it is attached are of little importance. In a case before the English Court of Queen's Bench,² in regard to a hydraulic press placed in a factory but not essential to its work, Mr. Justice Mellor said: "If we could see, as in the gas-works case,³ an intention that the chattel should remain fixed to the factory so long as the factory remained a factory, then we might think the press to be sufficiently fixed to become a part of the freehold ; but we see no such intention."

430. The enumeration of some fixtures excludes others. — The fact that a mortgage enumerates some fixtures, but does not enumerate others which afterwards become the subject of dispute, affords reason to suppose that these were intentionally omitted in the mortgage deed, and did not pass by it ;⁴ upon the principle "*Expressio unius est exclusio alterius.*"

431. The fact that a chattel has been mortgaged before it was attached to the realty seems to have been of weight in some cases, in leading to the determination that such mortgage carries the fixture as against a mortgage of the realty already existing ;⁵ and an agreement made by the mortgagor with a third person to whom the chattels belonged, that they should remain his after they are affixed to the realty until paid for, or that they should be

¹ *Hellawell v. Eastwood*, 6 Exch. 295.

² *Parsons v. Hind*, 14 W. R. 860.

³ *Reg. v. Lee*, L. R. 1 Q. B. 241 ; 14 W. R. 311.

⁴ *Trappes v. Harter*, 2 C. & M. 153, 177.

⁵ *Eaves v. Estes*, 10 Kans. 314 ; *Tibbetts v. Moore*, 23 Cal. 208 ; and see *Ford v. Cobb*, 20 N. Y. 344 ; *Sheldon v. Edwards*, 35 N. Y. 279 ; *United States v. New Orleans Railroad*, 12 Wall. 362.

subject until paid for to his right to remove them, has been held to have the same effect. In a case before the Court of Appeals of New York,¹ it was held that such an agreement preserved the character of the chattels as personal property when they would otherwise have become fixtures so as to pass by a mortgage of the realty. But it was said that while there was no doubt that the owner of the land intended that the articles, which were an engine and boilers, should ultimately become a part of the realty, and be permanently affixed to it, yet this intention was subordinate to the prior intention expressed by the agreement that the act of annexing them should not change their character as chattels until the price should be fully paid.

If the real estate is subject to a mortgage when chattels are annexed to it, which are not at the time subject to any personal mortgage, or to any equitable agreement for their subsequent removal, the chattels, if of the nature to become fixtures, become so immediately upon being attached to the land; and any chattel mortgage, or agreement that the articles should be considered personal property, will have no effect.² The chattels once having been annexed to the realty and bound by a mortgage of the realty cannot be dissevered, except with the consent of the mortgagee.

In a case where machinery for a saw-mill was sold to the owner under a condition that it should remain the property of the vendor until paid for, and after a part of it had been set up in the mill a mortgage was made of the mill premises, the mortgagee having no notice of this agreement, it was held that the part of the machinery which had been put up in the mill passed by the mortgage; but that as to such of the machinery as was then lying in the mill yard the mortgagee gained no title as against the unpaid vendor.³

432. Hired fixtures. — It has been held, however, that boilers put into a steam mill, after the execution of a mortgage upon the mill under an agreement with the mortgagor that he should have

¹ *Tift v. Horton*, 53 N. Y. 377. This case is not entirely in accord with the case of *Voorhees v. McGinnis*, 48 N. Y. 276, which related to an engine and boilers, which were covered by a chattel mortgage. It seems however that part of the articles

had been attached to the realty before the execution of the chattel mortgage.

² *Vanderpool v. Van Allen*, 10 Barb. (N. Y.) 157; *United States v. New Orleans Railroad*, 12 Wall. 362.

³ *Davenport v. Shants*, 43 Vt. 546.

the use of them at a certain rental, and that they should remain the property of the person who put them in, and who should have the privilege of removing them at his pleasure, were not subject to the mortgage.¹

In like manner machinery put into a mill subject to a mortgage, merely to exhibit it to the public by one not a party to the mortgage, is not covered by the mortgage.² Although such machinery be afterwards bought by one of the mortgagors, if this be not done with the intent to use it in connection with the business carried on upon the premises, it does not then come within the operation of the mortgage.³

433. Buildings erected on the mortgaged premises by the mortgagor are annexed to the freehold and cannot be removed by him, or by any one under his authority, while the debt remains unpaid.⁴ When, however, the building is erected merely for temporary use, and it is apparent that there was an intention that it should not become attached to the land even so slightly as by the sinking into the soil of the blocks upon which it rested, the mortgagee of the land will acquire no interest in it, although placed there by the mortgagor. If erected by a firm of which the mortgagor is a member for purposes of trade, it is all the more clear that it was not intended as a permanent improvement, or to become a part of the realty.⁵

The owner of a lot of land having by parol license allowed a third person to erect a building upon it, afterwards made a mortgage of it to one who had no notice of such license.⁶ It was held that he was entitled to the building, and having entered into possession might maintain trespass against one removing it; and it was held, too, that the mere fact that the person who erected the building occupied it was no notice of his claim to it.

A mortgage of a house passes the presses, cupboards, glazed doors, movable partitions, grates, ranges, and other like fixtures contained in it.⁷ It also passes the windows and blinds, though

¹ Hill v. Sewald, 53 Pa. St. 271.

² Stell v. Paschal, 41 Tex. 640.

³ Stell v. Paschal, *supra*.

⁴ Burnside v. Twitchell, 43 N. H. 390;

Cole v. Stewart, 11 Cush. (Mass.) 181;

Winslow v. Merchants' Ins. Co. 4 Met.

(Mass.) 306; Butler v. Page, 7 Met. (Mass.)

40; Sweetzer v. Jones, 35 Vt. 317, per Kellog, J.; Frankland v. Moulton, 5 Wis. 1.

⁵ Kelly v. Austin, 46 Ill. 156.

⁶ Powers v. Dennison, 30 Vt. 752.

⁷ Longstaff v. Meagoe, 2 Adol. & El. 167; Colegrave v. Dias Santos, 2 Barn. & Cress. 76.

temporarily separated from the house; the door keys;¹ a sundial erected on a permanent foundation;² a furnace so placed in a house that it cannot be removed without disturbing the brickwork of the house, and causing a portion of the ceiling to fall.³ Articles of furniture are not fixtures, though attached to the building. On this principle gas-fixtures adjusted to the gas-pipes do not pass with the realty.⁴

A mortgage of a plantation will not cover the wagons and tools used upon it, or the stock and cattle, unless such property be expressly included in the mortgage.⁵

434. Trees and shrubs planted in a nursery garden, for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, pass by a mortgage of the land, so that neither the mortgagor nor his assignee or creditors can remove them as personal property.⁶ One claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels. The mere fact that the trees and shrubs were the stock in trade of the mortgagor in his business as a nursery gardener is insufficient for this purpose. They are *primâ facie* parcel of the land itself, and would pass to a vendee upon a sale of the land unless specially excepted, and in the same way, unless excepted, pass to a mortgagee.⁷ Although planted by the mortgagor after the execution of the mortgage, they become a part of the realty and part of the mortgage security.⁸

435. Fixtures annexed before the mortgage.—A fixture annexed to the land at the time of the execution of the mortgage will pass by the mortgage without any special mention of the fixture, and even without any general description of it, or evidence of intention to include it, such as might be afforded as to machinery

¹ Liford's case, 11 Coke, 50.

² Snedeker v Warring, 12 N. Y. 170.

³ Main v. Scharzwaelder, 4 E. D. Smith (N. Y.), 273.

⁴ Shaw v. Lenke, 1 Daly (N. Y.), 487.

⁵ Vason v. Ball, 56 Ga. 268.

⁶ Maples v. Millon, 31 Conn. 598. And

see Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542; King v. Wilcomb, 7 Ib. 263.

⁷ Per Hinman, C. J., in Maples v. Millon, *supra*.

⁸ Price v. Brayton, 19 Iowa, 309.

or other articles employed for manufacturing purposes by a special mention of a mill aside from the description of the land. This was the decision in an early case in Massachusetts,¹ in which it was held that a kettle in a fulling mill set in brick-work, and used for dying cloth, passed by a mortgage of the land upon which the mill stood. The grounds of the decision were that this fixture could not be removed without actual injury to the mill; that it was essential to the use of the mill; and that being attached to it at the time of making the mortgage, it passed by it as part of the security.

As a general rule a mortgage of land passes the fixtures already upon it without any special mention being made of them. They pass with the estate and as a part of it. In a mortgage deed the premises were described as certain land "with the paper mill, &c., thereon, and water privilege, appurtenances, &c., together with all its privileges and appurtenances." The machinery in controversy was fastened to the floor of the mill by means of iron bolts with nuts upon the ends of them. The machinery, however, could be removed without injury to the building, and might be used in other paper mills. The machinery was subsequently attached by a creditor of the mortgagor, but it was held that it passed by the mortgage of the land and mill as a part of the realty.²

A mortgage of a mill passes the stones, tackling, and implements necessary for working it.³ A mortgage of a sugar-house carries with it an engine and machinery attached to it.⁴ Machinery set in bricks, and run by steam-power, for the purpose of manufacturing cotton-seed oil, constitutes a part of the realty and part of the security under a mortgage of the realty.⁵ A cotton-gin and press are fixtures and a part of the freehold, and are car-

¹ *Union Bank v. Emerson*, 15 Mass. 159. In *Hunt v. Mullanphy*, 1 Mo. 508, a kettle annexed in a like manner to the freehold was held not to be covered by the mortgage, on the ground that it was not permanently annexed.

² *Lathrop v. Blake*, 3 Fost. (N. H.) 46; *Burnside v. Twitchell*, 43 N. H. 390. In *Gale v. Ward*, 14 Mass. 352, 356, the fact that certain carding machines could be removed from the mill without injury to it, and might be used in any other build-

ing erected for a similar purpose, was a reason for considering them personal property and not covered by a mortgage of the realty. A like view was taken in *Fullam v. Stearns*, 30 Vt. 443, in respect to a planing machine, a circular saw and frame, and a boring machine.

³ *Place v. Fagg*, 4 Man. & R. 277.

⁴ *Citizens' Bank v. Knapp*, 22 La. An. 117.

⁵ *Theurer v. Nautre*, 23 La. An. 749.

ried by a mortgage of it, whether erected before or after the mortgage.¹

Of course, whenever it appears from the instrument itself that the parties did not intend that the machinery in the mill should be covered by the mortgage, it will not constitute a part of the mortgagee's security.²

436. Fixtures annexed after the mortgage.—Fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate and not for a temporary purpose;³ or if they are such as are regarded as permanent in their nature; or if they are so fastened or attached to the realty that the removal of them would be an injury to it. The question whether fixtures annexed to the realty after a mortgage of it has already been executed become a part of it, and thus become also subject to the mortgage, is a different one in some respects from that which arises when the same fixtures are already attached to the realty when the mortgage is made. As to those articles which in their nature are such as to render it doubtful whether they should be properly classed as fixtures or not, the tendency of the decisions seems to be to require stronger evidence of intention that things annexed to the realty after the making of the mortgage are actually fixtures, and therefore form with the land one security, than is required when they are affixed before the making of the mortgage. The reason of this apparently is, that when the personal articles are already attached to the realty when the mortgage is taken, it is more likely that they entered into the consideration of the parties in estimating the value of the security, than it is when they are not attached to the realty and may never be. It is true that there may be in the taking of a

¹ *Bond v. Coke*, 71 N. C. 97; *Latham v. Blakely*, 70 N. C. 368.

² *Waterfall v. Penistone*, 6 Ell. & Bl. 876; and see *Begbie v. Fenwick*, L. R. 8 Ch. App. 1075; 19 W. R. 402; *Brown on Fix.* 3d ed. pp. 148, 149.

³ *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *Gardner v. Finley*, 19 Barb. (N. Y.) 317; *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71; *Bond v. Coke*, 71 N. C. 97; *Ex parte Belcher*, 4 Dea. &

Chit. 703; *Hubbard v. Bagshaw*, 4 Sim. 326; *Ex parte Reynal*, 2 Mon., Dea. & De G. 443.

In a few cases considerable stress has been placed upon the fact that the personal chattels had already been mortgaged as personal before they were attached to the realty. *Eaves v. Estes*, 10 Kans. 314; *Tibbetts v. Moore*, 23 Cal. 208; *Davenport v. Shants*, 43 Vt. 546.

mortgage before the fixtures are annexed an expectation of an increased value to arise from their being subsequently attached to the realty, as when a building has been erected for a certain purpose, and it is contemplated that the machinery or other articles adapted to be used in it will be placed in it ; but it is evident that less reliance would be placed upon this expectation than upon the actual fact of the existence of the things upon the mortgaged estate. It does not follow, however, from the fact that the fixtures constituted no part of the mortgage security when it was taken, that they may therefore be removed without any wrong to the mortgagee. He is entitled to the benefit of any improvement of the property from whatever cause it may arise, just as he may suffer from a depreciation of it arising from accident or neglect, or from fluctuations in value due to general causes.¹

437. An equitable mortgagee has the same right to hold fixtures as part of his security that a legal mortgagee has.²

A woollen manufacturer mortgaged, by a deposit of the title deeds, a piece of land, with a building then upon it, and then built a mill upon the land and fitted it with a steam-engine and machinery necessary for his trade. Subsequently he assigned to another all the machinery and fixtures in the mill, and after this executed to the equitable mortgagee a legal mortgage of the estate. The Court of Queen's Bench held that all the machines which were fixed in a *quasi* permanent manner to the floor, roof, or side-walls, passed to the equitable mortgagee, but that those which were merely removable articles passed to the assignee under the the bill of sale.³

438. The law may be superseded by agreement. — If the mortgagee assent to an arrangement between the mortgagor and a mechanic, whereby the latter builds and sets up a machine upon the mortgaged premises, under a contract that the machine shall remain his property until paid for, or if the mortgagee, being in possession, treats it as personal property, and consents to its removal, a subsequent assignee of the mortgage cannot insist that

¹ See *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

² *Longbottom v. Berry*, L. R. 5 Q. B. 123 ; 39 L. J. (N. S.) Q. B. 87 ; see, also,

³ *Williams v. Evans*, 23 Beav. 239 ; Ex parte Astbury, L. R. 4 Ch. App. 630. *Tebb v. Hodge*, 39 L. J. (N. S.) C. P. 56.

under it he became the owner of the machine, as property annexed to the realty by the mortgagor. Such an agreement supercedes the general law as to fixtures between the mortgagor and mortgagee.¹ And such was the case also, where a person set up a steam-engine and boiler upon land owned by another, under an agreement that he might remove them at any time, and afterwards took a mortgage of the land from the owner of it. It was held that they never became the property of the mortgagor, or fixtures to the land, and therefore were not included in the mortgage.²

439. Fixtures annexed by a tenant of the mortgagor.—If fixtures be added to the property by a tenant at will of the mortgagor, after the mortgage, the right to remove them is determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails as between landlord and tenant; and they cannot be removed without the consent of the mortgagee.³ It does not avail the tenant that he annexed the fixtures under a special contract with the mortgagor,⁴ or that the holder of the mortgage, who seeks to enforce his claim to the fixtures, took the assignment of the mortgage with notice of the tenant's claim.⁵ Where, during the pendency of a suit to foreclose a mortgage, a stranger, by permission of the mortgagor, erected a barn on the mortgaged premises, it was held that as against the mortgagee he had no right to remove it.⁶

When permanent structures are erected by a lessee upon the mortgaged estate, the mortgagee's consent is necessary for their removal; but if they are erected for a temporary purpose, and with the intention of removing them, the lessee may remove them at any time during his term.⁷

If a lessee mortgages his leasehold estate, the same rules in relation to fixtures upon the estate apply as between him and his mortgagee that would apply if he owned the estate in fee.⁸

¹ *Bartholomew v. Hamilton*, 105 Mass.

239; *Frederick v. Devol*, 15 Ind. 357.

² *Taft v. Stetson*, 117 Mass. 471.

³ *Lynde v. Rowe*, 12 Allen (Mass.), 100;

Clary v. Owen, 15 Gray (Mass.), 522;

Hunt v. Bay State Co. 97 Mass. 279; *Day*

v. Perkins, 2 Sandf. (N. Y.) Ch. 359.

⁴ *Clary v. Owen*, *supra*.

⁵ *Clary v. Owen*, *supra*.

⁶ *Preston v. Briggs*, 16 Vt. 124.

⁷ *Kelly v. Austin*, 46 Ill. 156.

⁸ *Ex parte Bentley*, 2 M. D. & De G. 591;

Ex parte Wilson, 4 Dea & Chit. 143; 2

Mont. & Ayr. 61; *Shuart v. Taylor*, 7 How.

(N. Y.) Pr. 251.

440. Lessee's surrender of the term. — If a lessee mortgages tenant's fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them. The surrender of the term does not operate to extinguish the right or interest already granted, but is subject to that interest, for the support of which the original term still continues. The mortgagee's right to sever the fixtures from the freehold is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. "But we think," said Mr. Justice Williams, in a case before the English Court of Common Pleas,¹ "that it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender."

441. The rule as to trade fixtures not applicable. — It is a settled rule of law that fixtures annexed to the freehold by a tenant for the purposes of trade or manufacture may be removed by him at the expiration of his term, whenever the removal of them is not contrary to any prevailing practice, and the articles can be removed without causing material injury to the freehold.² The purpose of this rule is to encourage the putting up of works beneficial to the public by persons whose tenure of the property is so short or so uncertain that they would not make the improvements or put in the machinery necessary for the profitable pursuit of their business, unless they had the right of removing these things at the termination of their tenancy. The reason of this rule does not apply when the fixtures are annexed by one who has instead of the limited interest of a tenant an unlimited ownership in fee ; or an ownership which is qualified only by the condition of a mortgage upon the land which it is presumed he intends to fulfil, and which at any rate he would be estopped to say he did not intend to meet, and thus to keep the ownership of the land. Even after a forfeiture of the condition, he is allowed a considerable time within which to redeem, or else obtain the full value of the land and of all the personal articles he has affixed to it by a sale of the whole interest upon foreclosure. In a recent case before the Court

¹ The London & Westminster Loan and Discount Co. v. Drake, 6 Com. B. N. S. 798.

² Tyler on Fixtures, p. 267 ; Holbrook v. Chamberlin, 116 Mass. 155 ; Guthrie v. Jones, 108 Mass. 191.

of Exchequer,¹ the question of the application of this rule to the removal of a steam-engine and boiler used in a saw-mill upon the mortgaged premises before the execution of the mortgage was fully discussed. It was found by the jury that these things were put up by the mortgagor not to improve the inheritance, but for the better use of the property, and that they could be removed without any appreciable damage to the freehold; but the court held that these findings were immaterial, because the right of the mortgagee attached by reason of the annexation to the land, and therefore that the intention of the mortgagor in respect of them could not prevail against the legal effect of the deed. Kelly, C. B., delivering the judgment of the court, said: "It is a case between mortgagor and mortgagee, and no authority has been cited to show that a mortgagor is entitled to remove such trade fixtures. There have been several cases where the courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterward annexed a fixture to it, that the fixture shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to show that trade fixtures may be removed by the mortgagor, but there are several to the contrary; and unless we are prepared to overrule them, our judgment must be adverse to the plaintiff." This case was carried by appeal to the Exchequer Chamber,² where the judgment of the court below and the law there declared were affirmed. Mr. Justice Willes, speaking of the reason why the engine and boiler, though they might have been removed by a tenant at the expiration of his term, yet could not be removed by a mortgagor, said: "And we are of opinion, that the decisions which establish a tenant's right to remove trade fixtures do not apply as between mortgagor and mortgagee, any more than between heir at law and executor. The irrelevancy of these decisions to cases where the

¹ *Climie v. Wood*, L. R. 3 Exch. 257. To like effect see *Cullwick v. Swindell*, L. R. 3 Eq. Cas. 249, per Lord Romilly; *Ex parte Cotton*, 2 M., D. & De G. 725; *Hawtry v. Butlin*, L. R. 8 Q. B. 290; 21 W. R. 633; *Day v. Perkins*, 2 Sandf. (N. Y.) Ch. 359; *Maples v. Millon*, 31 Conn. 598.

² *Climie v. Wood*, 4 Exch. R. 328.

conflicting parties are mortgagor and mortgagee was pointed out in *Walmsley v. Milne*,¹ and we concur with the observations made in that case by the Court of Common Pleas." As illustrating this distinction and the reason of it, the learned judge quotes the language of Lord Cottenham, in a case before the House of Lords,² where it was sought to extend the rule in regard to trade fixtures to a case arising between an heir at law and executor: "The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land, and of the personal property which he erected and employed in carrying on the works: he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the control of the person who erected this machinery." To like effect Chief Justice Shaw, in a case before the Supreme Court of Massachusetts,³ said: "The mortgagor, to most purposes, is regarded as the owner of the estate; indeed he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself, and to enhance the general value of the estate, and not for its temporary improvement."

442. In Vermont the rule as to fixtures seems to be exceptionally strict in requiring that they shall in all cases be substantially attached to the freehold, and in holding that it is not sufficient to make personal chattels a part of the freehold that they are attached to the building in which they are used in a manner adapted to keep them steady, or that they are essential to the

¹ 7 C. B. N. S. 115.

³ *Winslow v. Merchants' Insurance Co.*

² *Fisher v. Dixon*, 12 Cl. & F. 312.

⁴ *Met. (Mass.)* 306.

occupation of the building for the business carried on in it. "The rule requiring actual annexation," says Mr. Justice Bennett,¹ "is not affected by those cases where a constructive annexation has been held sufficient. These cases may be regarded as exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture." It was moreover said that reference must be had not only to the annexation but also to the object and purpose of it; and that to change the nature and legal qualities of a chattel into a fixture requires not only a positive act on the part of the person making the annexation, but also that his intention to make this change should particularly appear; and that if this intention be left in doubt, the article should still be regarded as personal property. It was accordingly held in this case that in a mortgage of a mill for manufacturing paper, the iron shafting used to communicate the motive power to the machinery, and fastened to the building by means of bolts, should be regarded as a constituent part of the mill, and therefore as included in a mortgage of that; but that a large iron boiler supported by brick-work, laid on a stone foundation placed on the ground near the centre of the building, and also the machines for grinding rags into pulp, the paper presses, and other machinery, were no part of the real estate, as between the mortgagor and mortgagee.

This decision was followed by another to like effect in the same court, holding that while the steam-engine and boilers used in a marble mill were fixtures as between mortgagor and mortgagee, yet the saw frames, though fastened to the building by bolts, were not such fixtures. The manner in which they were attached to the building was not considered to be such as to operate to change their character as chattels.²

443. Statutory provisions in regard to mortgages of fixtures.—In Vermont it is provided by statute that machinery attached to or used in any shop, mill, printing-office, or factory, may be mortgaged by deed, executed, acknowledged, and recorded in the same manner as deeds of real estate; and shall have the

¹ *Hill v. Wentworth*, 28 Vt. 429.

Fullam v. Stearns, 30 Vt. 443; *Bartlett v.*

² *Sweetzer v. Jones*, 35 Vt. 317; and see *Wood*, 32 Vt. 372.

same effect, and may be assigned, discharged, or foreclosed in the same manner.¹

In Connecticut, it is provided that the fixtures of a manufacturing or mechanical establishment, or of a printing or publishing house, the furniture of a dwelling-house, and the hay in a barn, may be mortgaged with the realty when the mortgage contains a particular description of the machinery, furniture, or other property, to the same effect as if the same were a part of the real estate. The same may be mortgaged separate from the realty if particularly described, and the deed be executed, acknowledged, and recorded in all respects as a mortgage of land.²

2. *Machinery in Mills.*

444. Intention as to fixtures in a mill.—A distinction is properly made between such fixtures in a mill as are indispensable to its use as a mill, and the movable machines used in it, which may be dispensed with upon a change in business to which the mill may be readily adapted.³ Of the former class are such as are used for furnishing the motive power; and if the mill is adapted to one business only, the machinery necessary for that business may be included in the same class. Of the latter class are movable machines used in a mill adapted to various kinds of business, which may be wholly set aside, and still the value and usefulness of the mill property would not be materially impaired. Such machinery, not being indispensable to the enjoyment of the realty, is not considered a part of it, and does not pass by a mortgage of it.⁴ There is no certain criterion by which to determine in all cases what belongs to the one class and what to the other. Different courts decide differently in regard to the same articles; and even the decisions of the same court do not always seem to be perfectly consistent. The varying circumstances of the cases seem sometimes to have an immediate influence upon the determination of the courts, greater than the statement of them in the

¹ Gen. Stat. p. 640, §§ 5 & 6.

² Gen. Stat. p. 481.

³ *Farrar v. Chauffetete*, 5 Den. (N. Y.) 527.

⁴ *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Gale v. Ward*, 14 Mass. 352. In the latter case, Mr. Chief Justice Parker said

the articles in controversy "must be considered as personal property, because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes."

reports would seem to warrant. But in doubtful cases, where the mode and extent of the annexation of the chattels to the realty do not determine their character as fixtures, the intention with which they were put upon the estate, whether for permanent use or for a temporary purpose, comes in with a controlling influence to settle the doubt.¹ This intention is to be gathered not merely or chiefly from the manner in which the chattels are annexed to the realty, but from the character of the improvement, whether it is essential to the proper use of the realty.²

A mortgage was made of certain land, and the mills thereon.³ In the mills were various articles of machinery for carding, spinning, and preparing cotton yarn and cotton twine. These were subsequently seized upon an execution against the mortgagor, and were claimed as well by the mortgagee. It appeared that the machines might be easily removed without injury to them or to the building, and might be used for the same purpose in any other building.⁴ The court held that they were not properly fixtures, and therefore not subject to the mortgage. Under quite similar circumstances a mortgage of a woollen factory was held not to pass the looms used in it for the manufacture of broadcloth, and merely fastened to the floor by screws to keep them in their places.⁵ In these cases the intention was held to govern the character of the articles under consideration. It is to be observed, however, that other courts have decided cases quite similar, if not altogether like these cited from the New York reports, directly contrary to the decisions in these; and it is to be further observed that the policy of the decisions in this state seems to be to favor the treating of articles fixed to the realty as chattels.

445. A mortgagee of the realty as against a mortgagee of the fixtures may hold them.—In a late case in Massachusetts the right to certain machinery in a building used as a machine-

¹ Kelly v. Austin, 46 Ill. 156, per Walker, J.

² Green v. Phillips, 26 Gratt. (Va.) 752.

³ Vanderpoel v. Van Allen, 10 Barb. (N. Y.) 157. See, also, Cresson v. Stout, 17 Johns. (N. Y.) 116.

⁴ The highest authorities agree in holding that these facts alone should have little weight in deciding the question. See cases

cited in this section, and Walmsley v. Milne, 7 Com. B. N. S. 118.

⁵ Murdock v. Gifford, 18 N. Y. 28. In the Supreme Court it was held that the mortgage carried the looms, on the ground that they were intended to be a permanent and essential part of the woollen factory. Murdock v. Harris, 20 Barb. (N. Y.) 407.

shop, was contested between a mortgagee of the real estate, and a mortgagee of the machinery described as personal property.¹ Before either of the mortgages was made the mortgagor owned the machine-shop, and also the machinery, and used both for manufacturing purposes. It was held that such machines and their appurtenances as were specially adapted to be used in the shop and were annexed to it passed by the mortgage of the real estate. In this class were included punches, polishing frames, vibrators, a polisher and pan-blower, the pulleys, shafting, and hangers. These were bolted or screwed to the floors or timbers of the building, although it appeared that they could be removed without substantial injury to it. The wheels belonging to the polishing machines were placed in the same class, although they could be detached and removed without injury. But other articles not appearing to be essential parts of the shop, and not attached to it, were held not to pass by the mortgage of the real property, but by the mortgage of the personalty. Of these articles not considered fixtures in any sense of the word were the lathes fastened to a bench by screws, and operated by a foot movement; grindstones resting upon frames standing upon the floor; a rattler and frame, tack machines, the splitter, the anvils, the vises, the lathes, and a portable forge.

In a case in Ohio a similar question arose between the holder of a chattel mortgage of the fixtures and a mortgagee of the realty in respect to the boilers, engines, saws, and gearing of a steam saw-mill.² The chattel mortgage was made before the articles were annexed to the property, but it recited that they were designed to be used in the mortgagor's saw-mill, and power was given the mortgagees to take possession of them upon default, whether they should be attached to the freehold and in law become a part of the realty or not. The mortgage of the real estate was afterwards taken without notice of this agreement. The record of the chattel mortgage was constructive notice only of an incumbrance upon chattels; but when the mortgage of the real estate was made these things were not chattels but real

¹ *Pierce v. George*, 108 Mass. 78; and see, also, *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *Parsons v. Copeland*, 38 Me. 537; *Richardson v. Copeland*, 6 Gray (Mass.), 536; *Millikin v. Armstrong*, 17 Ind. 456.

² *Brennan v. Whitaker*, 15 Ohio St. 446. For a similar case with like decision, see *Frankland v. Moulton*, 5 Wis. 1. See, also, *Fortman v. Goepper*, 14 Ohio St. 558; *Voorhees v. McGinnis*, 48 N. Y. 278.

estate, and the record of the mortgage as a chattel mortgage was no notice to the mortgagee of the realty. The court declared that it devolved upon the mortgagee of the chattels who sought to change the legal character of the property after it was annexed to the realty, and to create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance; or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate of a purchaser without notice.¹ As against a mortgagee of the realty to sustain a claim to the fixtures, there must be either an actual severance of them previously made, or actual notice of the agreement by the mortgagor that they should be severed.

446. A steam-engine and boiler, with the appurtenances belonging to them, used for furnishing the motive power of a mill, together with the shafts and pulleys connected with the engine, are fixtures, and pass to a mortgagee of the realty.² The machinery of the motive power, whether a steam-engine or a water-wheel, and all the shafting and other means of communicating this power, are as a general rule fixtures.³ A steam-engine and boilers fixed in a mill by the mortgagor after the execution of the mortgage become subject to it.⁴ It is not material that they are the property of another, as for instance that they were leased to the mortgagor, if he annexes them to the freehold with the consent of the owner.⁵ Even if they were subject at the time to a chattel mortgage, this would not hold against the mortgage of the realty after they are attached to it.⁶ Nor does it make any difference that although erected in a permanent manner they

¹ Per White, J., in *Brennan v. Whitaker*, *supra*. He dissents from the ruling in *Ford v. Cobb*, 20 N. Y. 344, where it was held that an agreement evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land without notice; and cites to the contrary *Richardson v. Copeland*, 6 Gray (Mass.), 536, and other cases.

² *Harris v. Haynes*, 34 Vt. 220; *Sweetzer v. Jones*, 35 Vt. 317.

³ *Hill v. Wentworth*, 28 Vt. 429; *Keve v. Paxton*, 26 N. J. Eq. 107; *Powell v.*

Monson & Brimfield Manf. Co. 3 Mass. 459.

⁴ *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *McKim v. Mason*, 3 Md. Ch. Dec. 186; *Rice v. Adams*, 4 Har. (Del.) 332; see when may be removed, *Randolph v. Gywnne*, 7 N. J. Eq. 88.

⁵ *Fryatt v. Sullivan Co.* 5 Hill (N. Y.), 116; and see *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

⁶ *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278.

can be removed without injury to the building in which they are placed or with which they are connected.¹ A mortgage of a factory by a lessee passes a steam-engine used in it to the mortgagee, although the lessor could not claim it.²

447. A shingle machine put into a mill by a mortgagor after the execution of a mortgage of the freehold becomes a part of the mortgage security.³ Mill saws attached to a saw-mill and used in it become a part of the realty, and subject to a mortgage of the mill previously made.⁴ So also a machine for turning kegs, a machine for jointing staves, and a machine for cutting staves, were held to pass by a mortgage of a keg factory in which they were used, and to which they were attached.⁵ But, on the other hand, a planing and matching machine, and a machine for making mouldings, used in a sash and blind factory, were held not to pass by a mortgage of the realty.⁶ To constitute such machines fixtures, they must be actually annexed to the freehold in such a way as to evince an intention of making them a permanent accession to the freehold.⁷

448. Looms in a mill. — In a case still more recent these rules were applied to the determination of the question whether looms in a mill passed by a mortgage of it in which they were not named.⁸ The mortgage was of a mill “with the warehouse, counting-room, engine-house, boiler-house, weaving-shed, wash-house, gas-works, and reservoirs belonging, adjoining, or near thereto, and also the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever,” affixed to the land and premises. The assignees in bankruptcy of the mortgagor took posses-

¹ Sparks v. State Bank, 7 Blackf. (Ind.) 469; Voorhees v. McGinnis, *supra*.

² Day v. Perkins, 2 Sandf. (N. Y.) Ch. 359.

³ Corliss v. McLagin, 29 Me. 115. In Trull v. Fuller, 28 Me. 545, the owner of a saw-mill made a mortgage of a clap-board machine and shingle machine set up in the saw-mill and used there, which was recorded as a personal mortgage. Subsequently a creditor of the mortgagor levied an execution upon the land and mill, and it was held that these machines passed to

a purchaser of the real estate under the execution as parcel of the realty.

⁴ Burnside v. Twitchell, 43 N. H. 390.

⁵ Laffin v. Griffiths, 35 Barb. (N. Y.) 58; and see Snedeker v. Warring, 2 Kern. (N. Y.) 174; Walker v. Sherman, 20 Wend. (N. Y.) 639.

⁶ Rogers v. Brokaw, 25 N. J. Eq. 496.

⁷ Blanke v. Rogers, 26 N. J. Eq. 563.

⁸ Holland v. Hodgson, L. R. 7 C. P. 328; 41 L. J. C. P. N. S. 146; 20 W. R. 990.

sion of and sold among other things a large number of looms that were in the mill. Each loom rested upon four feet, and was attached to the floor by means of a wooden plug driven through each foot. The mortgagee claimed the looms as part of his security, and the Court of Common Pleas gave judgment in his favor, and this was affirmed by the Court of Exchequer Chamber. In the latter court Mr. Justice Blackburn said: "Since the decision of this court in *Climie v. Wood*,¹ it must be considered as settled law (except perhaps in the House of Lords), that what are commonly known as trade or tenants' fixtures form part of the land, and pass by a conveyance of it; and that the person who erected those fixtures, if he was a mortgagor in fee, has no right as against his mortgagee to sever them from the land. . . . It was admitted, and we think properly admitted, that where there is a conveyance of the land the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale." The learned judge further says that it has been contended, and justly, that *Hellawell v. Eastwood*² is very like the present case, with this exception, that there the tenant had a limited interest only, whereas here he has the fee; and if that case should apply to this case, it would follow (but for that exception, perhaps) that the looms which were in question remained chattels. But that case was decided in 1851. In 1853, the Court of Queen's Bench had, in *Wiltshier v. Cottrell*,³ to consider, what articles passed by the conveyance in fee of a farm; and there the court decided that a certain threshing-machine inside a barn, fixed by screws and bolts to four posts which were let into the earth, passed by the conveyance. It seems difficult to point out how the threshing-machine in that case was more for the improvement of the inheritance of the farm than the looms in the present case were for the improvement of the manufactory. Then there was the case of *Mather v. Fraser*,⁴ in 1856, and that of *Walmsley v. Milne*,⁵ in 1859, in which similar decisions to that in *Wiltshier v. Cottrell* were given. These cases "seem authorities for this principle, — that when an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all

¹ L. R. 3 Exch. 257; and on appeal, L. R. 4 Exch. 328.

³ 1 E. & B. 674.

⁴ 2 Kay & J. 536.

² 6 Exch. 295. This case also related to cotton-spinning machinery.

⁵ 7 C. B. (N. S.) 115.

events where the object of setting up the article is to enhance the value of the premises to which it is annexed, for the purposes to which those premises are applied. The threshing-machine in *Wiltshier v. Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same way as the hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve the usefulness of the stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing-machine or the hay-cutter." In conclusion, he says it is of great importance that the law as to what is the security of a mortgage should be settled, and that these decisions should not be reversed unless clearly wrong.

449. Cotton looms. — Under a mortgage of a mill for the manufacture of cotton cloth, with the appurtenances, "together with the steam-engines, boilers, shafting, piping, mill-gearing, gasometers, gas-pipes, drums, wheels, and all and singular other the machines, fixtures, and effects fixed up in or attached or belonging to the said mill or factory, buildings, or premises," the question arose, upon a subsequent sale of the estate under a power of sale contained in the mortgage, whether a large number of looms for weaving cotton yarn into cloth, and which were set into the floors without any fastening, passed by mortgage, and by the subsequent sale. Lord Romilly, giving the decision of the Court of Chancery,¹ said: "My opinion is, that those words mean that the mill and everything that properly belongs to the mill is the thing that is mortgaged. I do not think that the furniture of the mill does properly belong to the mill; it is liable to be changed from time to time. . . . I do not doubt that looms are machinery in one sense, but the question is, are they properly speaking machinery belonging to the mill? In one sense, no doubt, they belong to the mill, because they are put into the mill; but I read those words as 'belonging essentially to the mill,' and forming necessarily a part of it, whatever may be the purpose to which the mill may be applied. To whatever purpose the mill may be applied, the steam-power, the gas-lighting, and the like, do form

¹ *Hutchinson v. Kay*, 23 Beav. 413; also relating to machinery for the manufacture of cotton. Also, *McKim v. Mason*, 3 Md. Ch. 186.

a part of it, but the others do not, being merely accidental, and no more form a part of the mill than a carpet forms part of a house. If a house and all the things belonging to the house were assigned, that would not necessarily include the furniture unless it was so specified. . . . I am clear the looms are not fixtures in any proper sense of the term."

450. Machinery of a silk mill.—A silk manufacturer mortgaged certain land and "also all that silk-mill there erected or in the course of erection, and all other buildings then or thereafter to be erected thereon; and also all those the steam-engine or steam-engines, boilers, steam-pipes, main shafting, mill-gearing, millwright's work, and all other machinery and fixtures whatsoever there erected or set up, or to be thereafter, &c., upon the said plat of land, mill, and premises, with the appurtenances."¹ A second mortgage was made more comprehensive in terms, and the first mortgagee having sold the property under an order of court, the question arose upon a claim by the second mortgagee whether the spinning-mills and other machinery passed under the first mortgage. The Master of the Rolls held that only such machinery passed by the mortgage under the words "other machinery" as was of the same nature with the articles specified in the enumeration previously made, and that therefore only the machinery used for the purpose of giving power to the mill was included in the mortgage. On appeal, however, it was decided that all the machinery placed in the mill, whether for creating power or for being moved, was included in the mortgage. "It seems rather improbable," said Lord Chancellor Campbell, "that the parties should have contemplated such a damaging disruption of the machinery as must take place if the mortgagees, in seeking to make good their security, must tear in pieces the machinery in the mill, removing and selling one half of it, which would be comparatively of little value without the other half." . . . He concurs with the Vice-Chancellor Page Wood, in his general view of the law upon this subject in *Mather v. Fraser*,² and is of opinion that, according to the true construction of the mortgage deed, all the disputed articles are included in the mortgage to the defendants.

¹ *Haley v. Hammersley*, 3 De Gex, F. & J. 587; 9 W. R. 562. ² 2 K. & J. 536.

451. A mortgage of an iron rolling-mill was held to pass the entire set of rolls used in the mill, whether in place and fixed for use or temporarily detached.¹ The rolls, being adapted to the manufacture of bars of different shapes and sizes, cannot all be used at once; but they are equally a part of the mill when unfixed to give place to others. "Duplicates necessary and proper for an emergency," said Chief Justice Gibson, "consequently follow the realty, on the principle by which duplicate keys of a banking-house or the toll-dishes of a mill follow it." A similar decision was made in a recent case in England.² Mr. Justice Gifford giving the opinion said: "There appear to be connected with rolling machines parts which, beyond all doubt, are not fixed in the strict sense of the term; but it is in evidence that if a machine is ordered it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not speaking of rolls which can be considered as in any sense unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. . . . The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term 'belonging to the machine as part of it.'³ Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size. . . . But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it."

In the same case it was held that the straightening plates embedded in the floor were also fixtures, but that the weighing machines were not.

¹ *Voorhis v. Freeman*, 2 Watts & S. (Penn.) 116.

² *Ex parte Astbury*, L. R. 4 Ch. App. 630.

³ Dictum of Lord Cottenham in *Fisher v. Dixon* 12 Cl. & F. 312.

3. *Rolling Stock of Railways.*

452. Whether the rolling stock and fixtures of a railroad are personal property, or are in some sense fixtures, and therefore pass by a mortgage of the realty, is a question that has been much discussed and the decisions are conflicting. When this question was first presented to the Supreme Court of New York, it was decided that the rolling stock was to be deemed fixtures.¹ Mr. Justice Strong, delivering the opinion of the court, said: "The property of a railway company consists mainly of the road-bed, the rails upon it, the depot erections, and the rolling stock, and the franchises to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depots, are clearly real property. That the locomotives and passenger, baggage, and freight cars are a part, and a necessary part, of the entire establishment, there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures? . . . It may be that if an appeal should be made to the common sense of the community, it would be determined that the term fixtures could not well be applied to such movable carriages as railway cars. But such cars move no more rapidly than do pigeons from a dove-cote or fish in a pond, both of which are annexed to the realty." The learned judge then notices that railway cars are a necessary part of the entire establishment; that their wheels are fitted to the rails; that they are peculiarly adapted to the use of the railway, and cannot be used for any other purpose; and he concludes that they are necessary incidents of the real estate in a mortgage of it.²

This view is taken also by the courts of several states. In Illinois it is held that the rolling stock, as well as the rails, ties, chairs, spikes, if intended to be attached to the realty, is subject to a mortgage of the road.³ Like decisions have been made in Maryland⁴ and Pennsylvania.⁵

¹ Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. (N. Y.) 484.

² See, also, Morrill v. Noyes, 56 Me. 458; Pierce v. Emery, 32 N. H. 484; Haven v. Emery, 33 N. H. 66; Howe v. Freeman, 14 Gray (Mass.), 566; Coopers v. Wolf, 15 Ohio St. 523; Phillips v. Winslow, 18 B. Mon. (Ky.) 431; Benjamin v. Elmira C. R. Co. 49 Barb. (N. Y.) 441; otherwise

with machinery not necessary for the use of the road. Brainerd v. Peck, 34 Vt. 496.

³ Palmer v. Forbes, 23 Ill. 301; see, also, Hunt v. Bullock, 23 Ill. 320; Titus v. Ginhaimer, 27 Ill. 462; Constitution 1870, art. 11, § 10, declares rolling stock personalty.

⁴ State v. Northern R. Co. 18 Md. 193.

⁵ Phila., Wil. & Balt. R. Co. v. Woelpfer, 64 Pa. St. 366.

The question was discussed before the Supreme Court of the United States, but the decision turning upon another point, the case is not an authority one way or the other, although the inference has been drawn that the court would regard the rolling stock as a fixture.¹

The doctrine established by the Supreme Court of New York, in the case above cited, that a mortgage of the real estate of a railway company carries its rolling stock, has been departed from in the cases that have since been decided in that state, and the contrary doctrine, that the rolling stock is personalty, has been finally substituted in its place by a series of decisions, the last of which was rendered by the Court of Appeals in 1873.² The ground of the decision in this court was that the rolling stock is originally personal in character, and it is subservient to a mere personal trade, the transportation of freight and passengers; that the track exists for the use of the cars rather than the cars for the use of the track; and that there is no annexation, no immobility from weight, and no localization in use.³

4. Remedies for Removal of Fixtures.

453. Mortgagee may follow and take the fixture wherever found. — The rule is generally established that fixtures covered by a mortgage of the realty, when improperly removed, may be followed by the mortgagee wherever he can find them. The mortgagor himself can of course gain no right to hold them as against the mortgagee. A purchaser from the mortgagor has no such right, because he is affected with knowledge of the existing lien, and as against the mortgagee, his purchase is therefore fraudulent and void. "Even without knowledge of the mortgage," says Chief Justice Lowrie, of Pennsylvania,⁴ "it is hard to see how a purchaser could be relieved from this responsi-

¹ Minn. Co. v. St. Paul Co. 2 Wall. 609; and see Pennoek v. Coe, 23 How. 117.

² Stevens v. Buffalo & N. Y. City R. Co. 31 Barb. (N. Y.) 590; Beardsley v. Ontario Bank, 31 Ib. 619; Bement v. Plattsburgh & Montreal R. Co. 47 Ib. 104, in which case Mr. Justice Sutherland, arguing that the engines and cars are not affixed to the road, said: "We can take judicial notice of what everybody knows

that sometimes they *run and jump* off the track." This case was affirmed under the name of Hoyle v. Plattsburgh & Montreal R. Co. 51 Barb. 45; and afterwards having been carried to the Court of Appeals it was there affirmed, 54 N. Y. 314; and see also Randall v. Elwell, 52 N. Y. 521.

³ Per Johnson, Commissioner of Appeals, in Hoyle v. Plattsburgh & Montreal R. Co. *supra*.

⁴ Hoskin v. Woodward, 45 Pa. St. 42.

bility ; for all purchasers, hirers, and renters are bound to ascertain, or take the risk of assuming, the title of their vendors and lessors. But may not a mortgagor sell in the usual way the lumber, firewood, coal, ore, or grain found growing on the land, without violating the rights of the mortgagee ? Yes, he may, until the mortgagee stops him by ejectment or estoppelment, for those things are usually intended for consumption and sale, and the sale of them is the usual way of raising the money to pay the mortgage. But in the case of a factory or other building it is the use of it as it is, and not by its consumption or its sale by piecemeal, that all its profits are to be derived."

It has been held, however, that when a fixture, as for instance a house annexed to the real estate by the mortgagor, is afterwards, before the foreclosure of the mortgage, by him removed from the premises and sold, although it was part of the mortgaged premises, the mortgagee could not recover it from the purchaser ; that by the removal he lost his right to the property, though he might still have a cause of action for the waste.¹ But justice would seem to demand that one purchasing what he either actually or constructively knows to be mortgaged to another shall not be allowed to shelter himself behind his wrongful act, and say that thereby the nature of the property was changed, and authority supports this position.

454. Action for damages caused by the removal of fixtures.—

The mortgagee, by virtue of his interest in the property, may maintain an action against the mortgagor for removing fixtures, and thereby causing substantial and permanent injury and depreciation to the mortgaged estate. The owner of the equity has no more right than a stranger to impair the security of the mortgage. The damages are measured by the extent of the injury, and not by the insufficiency of the remaining security. The mortgagee is not obliged to apply in the first place the property that remains at any valuation whatever. "He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt." ²

When such injury has been done there can be but one recovery

¹ *Clark v. Reyburn*, 1 Kans. 281. To La. An. 117 ; *Buckout v. Swift*, 27 Cal. like effect see *Citizens' Bank v. Knapp*, 22 433.

² *Byrom v. Chapin*, 113 Mass. 308.

for it, and a reasonable satisfaction made in good faith to a prior mortgagee bars an action by a subsequent mortgagee.¹ But upon the question whether the injury had been settled and satisfied by payment to the first mortgagee, evidence is admissible to show that the articles removed were of greater value than the sum so paid, and that the damage done to the premises by their removal was greater than the value of the articles so removed.² In Wisconsin it is held the mortgagee after a decree of foreclosure may maintain an action for an injury done the mortgaged premises, either by the mortgagor or by a stranger, provided the security be thereby impaired and the mortgagor be insolvent.³

A mortgagee may recover the value of fixtures wrongfully removed from the mortgaged premises, although since such removal of them the property has been sold under a power in his mortgage, and he has himself purchased it at a price sufficient to satisfy his claim. His title is sufficient to sustain a cause of action.⁴

455. Mortgagee's right of action as affected by his not being in possession. — A mortgagee not having possession, or the right of possession, cannot maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger for breaking and entering the mortgaged premises and removing fixtures. But the right to recover damages for the value of the fixtures is separable from that to recover for "breach to the close."⁵ The right of present possession only affects the form of action. The right to recover depends upon the title, and not upon possession or the right of possession. In an action of tort for forcibly entering the house and removing fixtures, the mortgagee, even before condition broken, may recover the full amount of damage done to the estate by the removal without regard to the sufficiency of his security. Until the whole debt be paid, he cannot be deprived of any substantial part of his entire security without full redress therefor. As the injury affects the estate, it may be sued for directly by any one in whom the legal interest is vested. "A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury.

¹ Byrom v. Chapin, *supra*.

² Byrom v. Chapin, *supra*.

³ Jones v. Costigan, 12 Wis. 677.

⁴ Lullin v. Griffiths, 35 Barb. (N. Y.) 58.

⁵ Gooding v. Shea, 103 Mass. 360; Page v. Robinson, 10 Cush. (Mass.) 99; Woodman v. Francis, 14 Allen (Mass.), 198.

Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither, by merely showing that another may also sue or has sued. If he would defeat the claim of either, he must show that another having a superior right has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, *pro tanto*, of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeem." ¹

The mortgagee even before entering into possession can maintain an action against the mortgagor, or any other person who severs and removes from the mortgaged estate any articles which have been annexed to and made part of it. It makes no difference as against the mortgagee that the fixtures are severed by accident. Therefore if a building be partly destroyed by fire, the mortgagor has no right to sell such parts of it as are saved; and he cannot maintain an action for the price of such articles if the value of the land is less than the amount of the mortgage debt, and the mortgagee has entered for breach of the condition and forbidden the payment to the mortgagor.²

Where the mortgagee has no right to enter and the mortgagor can be deprived of possession only by a foreclosure and sale, he may retain possession after the sale until the delivery of the deed to the purchaser; but if he remove fixtures in the mean time, the purchaser may recover them by an action of replevin. The purchaser's deed takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor.³

A mortgagee not in actual possession and who has not entered to foreclose cannot maintain trespass against the owner of the equity of redemption for cutting grass on the land, as the owner has a right to take every annual crop.⁴ But if the property detached from the realty be fixtures subject as part of the realty to a mortgage, the mortgagee, whether in possession of the premises or not, may sue for the recovery of the things themselves

¹ Per Wells, J., in *Gooding v. Shea*,
supra.

³ *Sands v. Pfeiffer*, 10 Cal. 258.

⁴ *Woodward v. Pickett*, 8 Gray (Mass.),

² *Wilmarth v. Bancroft*, 10 Allen (Mass.), 617.
348.

in an action of replevin;¹ or may sue in trespass for damage done the freehold; or he may in an action of trover recover their value.² A tort-feasor has no right to complain of the form of the remedy.

¹ *Laflin v. Griffiths*, 35 Barb. (N. Y.) 58.

² *Hitchman v. Walton*, 4 M. & W. 409.

CHAPTER XII.

REGISTRATION AS AFFECTING PRIORITY.

1. *Nature and Application of Registry Acts.*

456. **In general.** — In this country a mortgage, like any other conveyance of real estate, is subject to registry laws by which its priority depends for the most part upon the priority of its registration. These laws in substance provide for the recording of all deeds properly executed which affect titles to real property, and of two or more conveyances of the same estate establish priority of title under that which is first recorded, although it may be the last executed.

Every subsequent purchaser is bound to take notice of a deed in the line of title previously recorded, although he had no actual notice of it. If he has relied upon the representations of his grantor in regard to the title to the premises without consulting the record, which is always open to his inspection, he has done so at his peril; although he may in such case be an innocent purchaser in fact, he is not regarded as such in law.¹

Systems of registration of land titles more or less complete have for a long time prevailed in Germany, France, and Scotland, and perhaps in other European states. Yet no general system of registration has ever been adopted in England.² In America, however, registry laws were enacted in the several colonies very soon after their settlement. In Massachusetts, as early as 1641, "for the avoiding of fraudulent conveyances, and that every man may know what estate or interest other men may have in any houses, lands, or other hereditament they are to deal in," it was enacted that "no mortgage, bargain, sale, or grant made of any houses or lands, rents, or other hereditaments, where the grantor remains in

¹ *Buchanan v. International Bank*, 78 Ill. 500. ² See chapter xiii. on "NOTICE."

possession, shall be of any force against other persons except the grantor and his heirs, unless the same be acknowledged before some magistrate, and recorded." In the Plymouth colony, conveyances of land, including mortgages, were required to be recorded by a law enacted five years before that of Massachusetts Bay.

457. Title deeds. — The English law in regard to the possession of title deeds has generally no application in this country, on account of the prevalence here of a general system of registry. Under the registry laws, the record being notice to all the world, it is not necessary that the mortgagee should have possession of the title papers.¹ Without the protection of such laws, the possession of the title deeds becomes an important badge of title; and it is said that the old rule in English chancery was that if a person took a mortgage and voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee, without notice, to whom the title deeds were delivered; but the later English doctrine is, that the mere circumstance of leaving the title deeds with the mortgagor is not, of itself, sufficient to produce this result. There must be something like a voluntary and unwarrantable concurrence of the first mortgagee in the mortgagor's retaining the title deeds, so that he really concurs in a fraud, or is grossly negligent, to defeat his mortgage.²

458. A mortgagee of real estate is a purchaser within the meaning of the recording laws. This is declared by statute in some states, and in others it is a rule of judicial construction. "When I speak of a purchaser for a valuable consideration," says Lord Hardwicke, "I include a mortgagee, for he is a purchaser *pro tanto*."³

But a distinction is taken between a mortgage given to secure a preëxisting debt, and one upon which the consideration is paid at the time of its execution. The former, although given upon a valid consideration as between the parties, is not regarded as a purchase for a valuable consideration which will entitle the mortgagee to protection against prior equities, although he had no

¹ Evans v. Jones, 1 Yeates (Pa.), 174.

³ In Willoughby v. Willoughby, 1 T.

² Berry v. Mutual Ins. Co. 2 Johns. (N. Y.) Ch. 603.

R. 763; and see Porter v. Green, 4 Iowa, 571; Seevers v. Delashmutt, 11 Iowa, 174.

notice of them when he took the mortgage.¹ He must have actually parted with some value or some right upon the faith of the mortgage and at the time of it, to entitle him to protection as a purchaser. He must have received some new consideration, or must have relinquished some security for a preëxisting debt due him.²

This rule requiring the payment of an actual consideration at the time of the transaction to constitute a *bonâ fide* purchaser, within the meaning of the recording acts, does not apply to any one but the original purchaser. He being protected by the recording acts from a prior unrecorded conveyance, any one who takes an assignment from him is entitled to the same protection, although the assignee parts with no valuable consideration for the assignment, or even has actual notice of the prior unrecorded conveyance.³

If the sole consideration of a conveyance be the love and affection of the grantor, it will not hold against a prior unrecorded mortgage of the same property; or against a mortgage imperfectly recorded.⁴

But there are authorities which hold that a mortgagee who has taken his mortgage in good faith to secure a preëxisting debt is

¹ *Pancoast v. Duval*, 26 N. J. Eq. 445; *Mingus v. Condit*, 23 Ib. 313; *Morse v. Godfrey*, 3 Story, 389; *Gafford v. Stearns*, 51 Ala. 434; *Short v. Battle*, 52 Ala. 456; *Zorn v. R. Co.* 5 S. C. 90; *Manhattan Co. v. Evertson*, 6 Paige (N. Y.), 457; *Van Hensen v. Radcliff*, 17 N. Y. 584; *Cary v. White*, 7 Lans. (N. Y.) 1; 52 N. Y. 138; *Weaver v. Barden*, 49 Ib. 286; *Padgett v. Lawrence*, 10 Paige (N. Y.), 180; *Stalker v. McDonald*, 6 Hill (N. Y.), 93; *Dickerson v. Tillinghast*, 4 Paige (N. Y.), 215; *Coddington v. Bay*, 20 Johns. (N. Y.), 637; *Westervelt v. Haff*, 2 Sandf. (N. Y.) Ch. 98.

The same rule was laid down in Illinois in the case of *Metropolitan Bank v. Godfrey*, 23 Ill. 579. In later cases, however, it has been held, so far as negotiable paper is concerned, that an indorsee taking it before maturity as payment or security for a preëxisting debt is a holder for value, and takes it free from latent defences on

the part of the maker. *Doolittle v. Cook*, 75 Ill. 354; *Manning v. McClure*, 36 Ill. 490. In the latter case, Mr. Justice Lawrence, referring to *Metropolitan Bank v. Godfrey*, *supra*, said: "We do not desire to be understood as overruling that position, but if that question comes again before us, it will be open to argument, whether a different principle should be applied to conveyances of real estate from that which all the members of the court agree should be applied to the indorsement of a promissory note."

² *Spurlock v. Sullivan*, 36 Tex. 511; *Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Webster v. Van Steenbergh*, 46 Barb. (N. Y.) 211; and see *Lawrence v. Clark*, 36 N. Y. 128.

³ *Webster v. Van Steenbergh*, 46 Barb. (N. Y.) 211; *Wood v. Chapin*, 13 N. Y. 509.

⁴ *Aubuchon v. Bender*, 44 Mo. 560; *Bishop v. Schneider*, 46 Mo. 472.

entitled to be regarded as a purchaser, and to be protected as such.¹ But the weight of authority is very decidedly against this position.

459. The giving of further time for the payment of an existing debt, by a valid agreement, for any period however short, is a valuable consideration, and is sufficient to support a mortgage as a purchase for a valuable consideration. But the mere taking of collateral security on time is not by itself, and in the absence of any agreement beyond it, an extension of the time of payment of the original debt; and therefore a mortgage taken as security in such way is not a purchase for value.²

460. A judgment creditor is not generally a purchaser within the recording acts. He was not regarded as a purchaser at common law. In a case in Peere Williams, "it was granted," said the reporter, "that if Lord Winchelsea, the covenantor, had made a mortgage of the premises for a valuable consideration and without notice, such mortgagee, in regard that he might have pleaded his mortgage, and would have been as a purchaser without notice, should have held place against the intended purchaser, for then the money would have been lent on the title and credit of the land, and would have attached on the land; which would not be so in the case of a judgment creditor, who, for ought that appears, might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is a general security, not a specific lien on the land."³ And in another case given by the same reporter it was said, that "one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*."⁴ The recording acts do not change the common law in this respect. They have not interposed generally to protect a judgment lien; and where they have not it stands, as at common law, subject to the prior conveyance.⁵ If there be an existing mortgage at the time the

¹ Babcock v. Jordan, 24 Ind. 14, and *supra*. See, also, cases cited in the last cases cited.

² Cary v. White, 52 N. Y. 138, reversing, 7 Lans. (N. Y.) 1; Wood v. Robinson, 22 N. Y. 564; the *dictum* in the case of Pratt v. Coman, 37 N. Y. 440, to the contrary, is denied in Cary v. White,

³ Finch v. Winchelsea, 1 P. Wms. 277.

⁴ Bracc v. Dutchess of Marlborough, 2 P. Wms. 491.

⁵ Cover v. Black, 1 Pa. St. 493, per Chief Justice Gibson; Rodgers v. Gibson,

judgment is rendered, that will bind only the equity of redemption whether the mortgage be recorded or not, or whether the judgment creditor had or had not actual notice of the mortgage when he obtained the judgment.¹ An attachment of land upon the debt of one holding the record title does not avail at all against the equitable owner of the estate, or against one claiming under a mortgage or deed not recorded.² There is no appreciable distinction between an attachment and a levy of an execution or a judgment lien, except that which results from the amount of expense incurred in the latter proceedings, and such expense cannot be regarded as placing the creditor in the situation of a *bonâ fide* purchaser.³ Whether the lien be by attachment or by judgment it is a lien only upon the real estate, or the interest in it owned by the debtor, not upon that owned by another, as is the case when the debtor has conveyed it or mortgaged it, although the deed be unrecorded. The creditor is entitled to the same rights as the debtor had, and no more.⁴

461. Priority as between a mortgage and judgment. — A mortgage recorded prior to an entry of judgment which is a lien upon the property, takes precedence of the judgment lien.⁵ And so if a creditor have actual notice of a prior unrecorded mortgage at the time of obtaining his judgment lien,⁶ or before the debt was contracted,⁷ he will hold his lien subject to such mortgage. A mortgage executed and recorded after a judgment is entered against the mortgagor is of course subject to the judgment lien. A mortgage and a judgment entered of record on the same day, the record not showing which was first recorded, are payable *pro rata*.⁸ Under a statute which provides that a mortgage recorded within a certain time after its date shall take effect as between the parties from its date, a judgment recovered subsequently to

4 Yeates (Pa.), 111; Heister v. Fortner, 2 284; Dunwell v. Bidwell, 8 Minn. 34; Bin. (Pa.) 40. Wertz's Appeal, 65 Pa. St. 306.

¹ Knell v. Green St. Building Ass'n, 34 ⁶ Williams v. Tatnall, 29 Ill. 553; Md. 67. Thomas v. Vanlieu, 28 Cal. 616; and see Cheesebrough v. Millard, 1 Johns. (N. Y.)

² Hackett v. Callender, 32 Vt. 97. ⁷ Britton's Appeal, 45 Pa. St. 172. Ch. 409.

³ Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252. ⁸ Hendrickson's Appeal, 24 Pa. St.

⁴ Norton v. Williams, 9 Iowa, 529. 363.

⁵ Jackson v. Dubois, 4 Johns. (N. Y.) 216; Scott v. McMurrin, 7 Blackf. (Ind.)

the date of a mortgage, and before the recording of it, binds only the equity of redemption and is subject to the mortgage without regard to the question of actual notice, if the mortgage is subsequently recorded within the time prescribed by law.¹

462. Where an unrecorded mortgage is preferred to a judgment. — Where a judgment creditor is not considered a purchaser within the recording acts, a judgment lien or attachment is not protected by them; and a mortgage being valid without being recorded, for all purposes except that of preserving its lien against *bonâ fide* purchasers and mortgagees, is valid against a judgment lien.² In such case it makes no difference that the mortgage was given to secure future advances, which had not been made when the judgment was rendered.³

Generally, knowledge on the part of a judgment or attaching creditor of an unrecorded mortgage upon the debtor's property affects him as it would a purchaser, that is, the notice is equivalent to a record of the mortgage.⁴ But where a statute provides that a mortgage shall not be a lien upon the property until it shall have been recorded, then the doctrine of notice, it has been held, does not apply to a creditor, but to purchasers only.⁵

463. The reverse rule held in several states. — But on the other hand in several states it is held that the lien of a judgment, or a levy of execution, is superior to an unrecorded mortgage, or to a recorded mortgage which is defectively executed, in the absence of actual notice of the mortgage on the part of the judg-

¹ *Knell v. Green St. Building Ass'n*, 34 Md. 67.

² *Burgh v. Francis*, 1 Eq. Cas. Abr. 320, pl. 1; *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; *Burn v. Burn*, 3 Ves. 582; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Schmidt v. Hoyt*, 1 Edw. (N. Y.) Ch. 652; *Pixley v. Huggins*, 15 Cal. 127; *Orth v. Jennings*, 8 Blackf. (Ind.) 420; *Greenleaf v. Edes*, 2 Minn. 264; *Kelly v. Mills*, 41 Miss. 267; *First Nl. Bank of Tama City v. Hayzett*, 40 Iowa, 659; *Hoy v. Allen*, 27 Iowa, 206; *Churchill v. Morse*, 23 Iowa, 229; *Welton v. Tizzard*, 15 Iowa, 495; *Bell v. Evans*, 10 Iowa, 353; *Evans*

v. McGlasson, 18 Iowa, 150; *Norton v. Williams*, 9 Iowa, 529; *Patterson v. Linder*, 14 Iowa, 414; *Righter v. Forrester*, 1 Bush (Ky.), 278; *Morton v. Robards*, 4 Dana (Ky.), 258.

³ *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268.

⁴ *Priest v. Rice*, 1 Pick. (Mass.) 164.

⁵ *Hulings v. Guthrie*, 4 Pa. St. 123; *Jaques v. Weeks*, 7 Watts (Pa.), 261. These cases seem to be overruled in *Solms v. McCullogh*, 5 Pa. St. 473; but the authority of the latter case is questioned in *Uhler v. Hutchinson*, 23 Pa. St. 110.

ment creditor in the one case, or of the execution purchaser in the other.¹ Although the creditor has notice of the mortgage, a purchaser at the sale upon execution is not affected by it, and being without notice himself, he acquires a title superior to the unrecorded mortgage.² And on the other hand, a judgment creditor having gained priority over an unrecorded mortgage, a purchaser at the execution sale obtains the same priority, notwithstanding he has notice of the mortgage.³

In Ohio, inasmuch as the statute declares that mortgages shall take effect only from the time they are left for record, a judgment recovered after the date of a mortgage, and before it is recorded, takes precedence of it.⁴ Yet, in this state, a judgment creditor is not a purchaser, nor is he in any way entitled to the privileges of that position.⁵

464. Purchase money mortgage.—A mortgage given at the time of the purchase of real estate, to secure the payment of purchase money, has preference over all judgments and other debts of the mortgagor, to the extent of the land purchased. It is so provided by statute in several states.⁶ A purchase money mortgage is good and effectual against the wife of the mortgagor, without her joining in the execution of it. The seisin of the husband is instantaneous only; and it is a well settled rule that in such case no estate or interest can intervene.⁷ This rule applies even where the mortgage is made to a third person.⁸ Dower attaches as against every one but the mortgagee and his assigns.⁹

¹ *Van Thorniley v. Peters*, 26 Ohio St. 471; *Mayham v. Coombs*, 14 Ohio, 428; *White v. Denman*, 16 Ohio, 59; 1 Ohio St. 110; *Fosdick v. Barr*, 3 Ib. 471; *Holiday v. Franklin Bank*, 16 Ohio, 533; *Hulings v. Guthrie*, 4 Pa. St. 123; *Hilbard v. Bovier*, 1 Grant (Pa.) Cas. 266; *Uhler v. Hutchinson*, 23 Pa. St. 110; *Barker v. Bell*, 37 Ala. 354; *Moore v. Watson*, 1 Root (Conn.), 388; *Reichert v. McClure*, 23 Ill. 516.

² *Miles v. King*, 5 S. C. 146.

³ *Smith v. Jordan*, 25 Ga. 687.

⁴ *Mayham v. Coombs*, 14 Ohio, 428.

⁵ *Tousley v. Tousley*, 5 Ohio St. 78.

⁶ **INDIANA**: G. & H. Stat. vol. 2d, p. 356.

KANSAS: Dassel's Stat. 1876, c. 68, § 4.

MISSISSIPPI: Rev. Code of 1871, p. 501.
MARYLAND: Pub. Gen. Laws, 1860, art. 64, § 3.

NEW JERSEY: Nixon's Dig. p. 147, § 20.
NEW YORK: Code of Remedial Justice, 1876, § 1254.

DELAWARE: Rev. Stat. 269.

⁷ **NORTH CAROLINA**: Battle's Revisal, 1873, c. 35, § 30; *Birnie v. Main*, 29 Ark. 591; *Stow v. Tift*, 15 Johns. (N. Y.) 458; *Mills v. Van Voorhies*, 20 N. Y. 412.

⁸ *Clark v. Monroe*, 14 Mass. 351; *McGowan v. Smith*, 44 Barb. (N. Y.) 232; *Kittle v. Van Dyck*, 1 Sandf. (N. Y.) Ch. 76.

⁹ *Young v. Tarbell*, 37 Me. 509.

465. Priority of a purchase money mortgage. — A provision of statute, that a mortgage for purchase money shall be preferred to any previous judgment which may have been obtained against the purchaser, applies only to a mortgage made by the purchaser to the vendor, and not to a mortgage made to a third person to secure the payment of money which was applied by the purchaser to the payment of the purchase money of the land. The term purchase money does not include money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor. It is only between them that it is purchase money. As between the purchaser and a third party, it is simply borrowed money. To give this provision any other construction would be to assign and enlarge the vendor's lien without limit.¹

The mortgage for purchase money, to be entitled to preference, must be executed simultaneously with the deed of conveyance from the vendor. If an interval of time is left between the two transactions, during which the interest of the purchaser is liable to be seized on execution upon the judgment, this preference is lost, and the judgment is entitled to priority.² If the instruments are delivered at the same time, it does not matter that they were executed on different days, because they take effect only from the delivery.³

The provision that a mortgage from a purchaser to a vendor, delivered simultaneously with the deed, to secure the purchase money, shall be preferred to a previous judgment against the vendee, does not imply that in every other case such judgment shall have preference. A mortgage from a lessee to his lessor, delivered at the same time with the lease, to secure future advances, is within this provision.⁴

The effect of a mortgage to secure purchase money, executed simultaneously with the deed to the vendee, is, that the vendee

¹ *Heusler v. Nickum*, 38 Md. 270; *Alderson v. Ames*, 6 Md. 56; *Stansell v. Roberts*, 13 Ohio, 148. In *Clabaugh v. Byerly*, 7 Gill (Md.), 354, it was decided that a junior mortgage was entitled to no preference over a prior one by showing that the money received upon it was applied in payment of judgments which had priority.

² *Ahern v. White*, 39 Md. 409; *Heusler v. Nickum*, 38 Md. 270; *Foster's App.* 3 Pa. St. 79.

³ *Cake's App.* 23 Pa. St. 186; *Mayberry v. Brien*, 15 Pet. 21; *Banning v. Edes*, 6 Minn. 402.

⁴ *Ahern v. White*, 39 Md. 409.

has only an instantaneous seisin, and the legal title remains with the vendor, who becomes the mortgagee of the land.¹

A reservation in a conveyance of an annual rent, with a condition that the grantor may enter and take possession in case of non-payment, is in effect a conveyance and mortgage back for the purchase money, and is superior to any other incumbrance which the grantee can create.²

466. But without the aid of any statute a purchase money mortgage executed simultaneously with the deed of purchase excludes any claim or lien arising through the mortgagor. "It is a principle of law," says Chief Justice Caton, of Illinois,³ "too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment vest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase money."

A change in the form of the security for the purchase money, as from a mortgage to a deed of trust, will not change the character of the debt. The consideration continues to be purchase money.⁴ The same rule applies in case the mortgage is to another than the vendor, who actually advances the means to pay the purchase money.⁵

It must appear, however, that the deed and mortgage constituted but one transaction.⁶ The seisin of the purchaser being merely a transitory one, no lien can intervene, and therefore the same rule applies to the exclusion of any intervening lien, as for

¹ Baker v. Clepper, 26 Tex. 629.

² Stephenson v. Haines, 16 Ohio St. 478.

³ Curtis v. Root, 20 Ill. 53; and see Fitts v. Davis, 42 Ill. 391; Banning v. Edes, 6 Minn. 402; Bolles v. Carli, 12 Minn. 113.

⁴ Curtis v. Root, *supra*; Austin v. Underwood, 37 Ill. 438.

⁵ Curtis v. Root, *supra*; Beebe v. Austin, 15 Johns. (N. Y.) 477; Haywood v. Nooney, 3 Barb. (N. Y.) 643; Adams v. Hill, 9 Fost. (N. H.) 202.

⁶ Grant v. Dodge, 43 Me. 489.

instance a lien for labor and materials furnished the purchaser, who has entered before the execution of the deed and mortgage, which are afterwards delivered simultaneously; ¹ or an agreement made in relation to the premises by the purchaser before the purchase; ² or right of homestead. ³

A suit to foreclose a mortgage, given to secure the purchase money of land, is not a suit for the enforcement of a vendor's lien. Neither the husband nor wife can set up a homestead right against such a mortgage given contemporaneously with the deed of purchase. ⁴ A mortgage for purchase money has priority over a mechanic's lien for a building erected by the purchaser before he received a deed, and while he held a bond for a deed, and although the lien was filed before the making of the deed. ⁵

467. The mortgage valid against the mortgagor and his heirs without registry. — Of course the recording of a mortgage is not necessary as against the mortgagor; ⁶ and even in those states where it is provided by statute that a mortgage shall be recorded within a stipulated time, it is still valid between the parties without registration. The mortgagee by an unrecorded mortgage will be protected by a court of equity, so far as this can be done without infringing upon the rights of subsequent purchasers, or third persons who have in the mean time acquired liens of record upon the property. ⁷ It is for their protection, however, that a record is provided for. As between the parties themselves,

¹ *Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deusen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. 242; *Guy v. Carriere*, 5 Cal. 511.

² *Bolles v. Carli*, 12 Minn. 113; *Morris v. Pate*, 31 Mo. 315.

³ *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 391; *Carr v. Caldwell*, 10 Cal. 380; *Amphlett v. Hibbard*, 29 Mich. 298; *Nicholas v. Overacker*, 16 Kans. 54; *Magee v. Magee*, 51 Ill. 500; *Austin v. Underwood*, 37 Ill. 438; *Allen v. Hawley*, 66 Ill. 168; *Lane v. Collier*, 46 Ga. 580. See *Pratt v. Topeka Bank*, 12 Kans. 570, for a case where a mortgage given upon a homestead by husband and wife was partly paid, and a new mortgage for the balance given by the husband alone.

⁴ *Hopper v. Parkinson*, 5 Nev. 233.

⁵ *Virgin v. Brubaker*, 4 Nev. 31.

⁶ *Wood v. Chapin*, 13 N. Y. 509; *St. Marks F. Ins. Co. v. Harris*, 13 How (N. Y.) Pr. 95; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Jackson v. West*, 10 Johns. (N. Y.) 466; *Fosdick v. Barr*, 3 Ohio St. 471; *Sidle v. Maxwell*, 4 Ohio St. 236; *Levinz v. Will*, 1 Dall. 430; *Leggett v. Bullock*, Busb. (N. C.) L. 283; *Seaver v. Spink*, 65 Ill. 441; *Howard Mut. Loan & Fund Ass'n, v. McIntyre*, 3 Allen (Mass.), 571; *Perdue v. Aldridge*, 19 Ind. 290; *Carleton v. Byington*, 18 Iowa, 482; *Moore v. Thomas*, 1 Oreg. 201.

⁷ *Wynn v. Carter*, 20 Wis. 107.

there is no occasion for a public record to give notice. Although it has sometimes been said that the delivery of a mortgage for record is a part of the execution of the instrument, this is not true except so far as the expression has reference to its effect upon those who are not parties to it.¹ Even the destruction of the mortgage before the recording of it, whether by accident or by the wrongful act of a third person, does not annihilate the lien as between the parties and all others claiming with notice.²

A mortgage without acknowledgment or record is good against the mortgagor, and his heirs or devisees, and against others who have actual notice of its existence before they acquired title.³ If the title is not dependent upon the time of recording, and the record is merely to authorize its introduction as evidence, it may be recorded after action brought to enforce it, and at any time before trial. This rule is equally applicable to the case of an assignment of a mortgage, which may be recorded after the assignee has brought an action to foreclose, and at any time before trial and judgment.⁴

468. The assignee of a bankrupt has no greater rights in respect to unrecorded deeds made by the debtor than he himself would have. He therefore takes the bankrupt's estate, subject to any conveyances he has made, although they remain unrecorded. But one who purchases of the assignee, without notice of an unrecorded mortgage, takes the property unincumbered by it.⁵

469. Equitable mortgages are generally held to be within the recording acts as much as are legal mortgages.⁶ At first a different interpretation was put upon the acts, and a mortgage of an equity or of an equitable estate was not constructive notice when registered.⁷ But at an early day in this country it was established, either judicially or by statute, that all rights, incum-

¹ *Sidle v. Maxwell*, 4 Ohio St. 236; limiting *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533.

² *Sloan v. Holcomb*, 29 Mich. 153.

³ *Johnston v. Canby*, 29 Md. 211; *Marshall v. Fisk*, 6 Mass. 24; *Dole v. Thurlow*, 12 Met. (Mass.) 162.

⁴ *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

⁵ *Hodgen v. Guttery*, 58 Ill. 431.

⁶ *Hunt v. Johnson*, 19 N. Y. 279; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Crane v. Turner*, 7 Hun (N. Y.), 357; *Boyce v. Shiver*, 3 S. C. 515.

⁷ *Doswell v. Buchanan*, 3 Leigh (Va.), 377.

brances, or conveyances touching or in any way concerning land should appear upon the public records, and that conveyances of equitable interests as well as legal were within the registry acts. A mortgage, therefore, of such an interest if first recorded is preferred to a mortgage of the legal estate.¹

A mortgage of an equitable interest under a contract of purchase, although no legal estate passes by it, is within the operation of the registration acts, and should be recorded to entitle it to priority over a subsequent mortgage of the same interest; and an assignment of such a contract as security for a debt is regarded as a mortgage.²

Generally the record of an agreement constituting an equitable mortgage is notice to a subsequent purchaser of the legal estate.³ One in possession of lands under a parol contract to purchase them may mortgage his interest in them, and the record of the mortgage will be notice to subsequent purchasers and incumbrancers.⁴ But on the other hand it is held that the mortgage of an equitable title is not constructive notice to purchasers of the land from a holder of the legal title.⁵

470. An equitable mortgage for a precedent debt has no equity superior to that of a valid subsequent judgment at law. Between such contestants the first perfected legal title should prevail. The rule is otherwise with regard to *bonâ fide* purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity in the latter case regards the equitable mortgagee as a *bonâ fide* purchaser.⁶

471. Mortgages of leasehold estates. — The recording acts apply not only to mortgages of freehold estates, but as well to those of leasehold estates of such duration of term as to come within the recording acts of the several states.⁷ Such mortgages

¹ U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; and see White & Tudor's Lead. Cas. in Eq. 4th Am. ed. vol. 2, part 1, p. 204, where the cases are collected.

² Bank of Greensboro v. Clapp, 76 N. C. 482.

³ Parkist v. Alexander, 1 Johns. (N. Y.) Ch. 394; Hunt v. Johnson, 19 N. Y. 279; General Ins. Co. v. United States Ins. Co. 10 Md. 517; Jarvis v. Dutcher, 16 Wis. 307.

⁴ Crane v. Turner, 7 Hun (N. Y.), 357.

⁵ Halsteads v. Bank of Ky. 4 J. J. Marsh. (Ky.) 554.

⁶ Wheeler v. Kirtland, 24 N. J. Eq. 552.

⁷ Decker v. Clarke, 26 N. J. Eq. 163; Berry v. Mutual Ins. Co. 2 Johns. (N. Y.) Ch. 603; Johnson v. Stagg, 2 Johns. (N. Y.) 510, 523; Breese v. Bange, 2 E. D. Smith (N. Y.), 474.

are not only as a general rule within the terms of these acts, but therefore within the reason and spirit of them, inasmuch as they are equally within the mischief for which they provide a remedy; and they do not come under the provisions relating to the recording of mortgages of personal property, as these have reference only to chattels personal.¹

472. The registration laws apply to assignments.—The registration laws and the doctrines of priority by record generally extend to assignments of mortgages as well.² The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of the mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, the mortgage ceases to be a lien, as against one who purchases the property in good faith and without notice.³ In like manner an assignee of the mortgage is not bound

¹ Decker v. Clarke, *supra*.

² Belden v. Meeker, 47 N. Y. 307; S. C. 2 Lans. (N. Y.) 470, overruling Hoyt v. Hoyt, 8 Bosw. (N. Y.) 511; Vanderkemp v. Shelton, 11 Paige (N. Y.), 28; S. C., Clarke (N. Y.), Ch. 321; Fort v. Burch, 5 Den. (N. Y.) 187; St. John v. Spalding, 1 Thomp. & C. (N. Y.) 483; James v. Johnson, 6 Johns. (N. Y.) Ch. 417; James v. Morey, 2 Cow. (N. Y.) 246; Campbell v. Vedder, 1 Abb. (N. Y.) App. Dec. 295; Bowling v. Cook, 39 Iowa, 200; Bank of the State of Ind. v. Anderson, 14 Ib. 544; McClure v. Burris, 16 Ib. 591; Cornog v. Fuller, 30 Ib. 212.

In INDIANA, the statute not providing for the record of assignments, it is held the record of them is not notice. Hasselman v. McKernan, 50 Ind. 441.

In PENNSYLVANIA the record of an assignment of a mortgage is notice to subsequent assignees of the mortgage. Neide v. Pennypacker, 9 Phila. (Pa.) 86; and to subsequent purchasers and mortgagees as well. Leech v. Bonsall, Ib. 204. These decisions are based on the Act of April 9, 1849, § 14. So far as the general recording act of 1715 is concerned, "though there has been no express decision that

under it an assignment of a mortgage may be recorded, so as to be notice to subsequent purchasers; yet, taking the latest expression of the supreme court on the subject, we might so decide without disregarding any binding authority, or any clearly indicated opinion of that court." Per Mr. Justice Mitchell in Neide v. Pennypacker, *supra*; citing Philips v. Bank of Lewiston, 18 Pa. St. 401. In the later case of Pepper's Appeal, 77 Pa. St. 373, it was distinctly held that the recording of an assignment is notice to a subsequent assignee under the above statute. Mr. Justice Mercur, delivering the opinion of the court, said it was alleged on the argument that it is not estomary in Philadelphia to search the records for assignments of mortgages. Be that as it may, if any custom exists not in harmony with the act, it must give way. *Malus usus aboletendus est*.

In MARYLAND provision was made for recording assignments of mortgages by Act 1868, c. 373; but this does not affect an equitable assignment. Byles v. Tome, 39 Md. 461.

³ Bowling v. Cook, *supra*; Henderson v. Pilgrim, 22 Tex. 464.

by an unrecorded agreement executed between the parties to the mortgage, whereby the mortgagee was bound to release a portion of the premises, upon receiving a certain sum in payment.¹ The doctrine that the assignee of a mortgage takes it subject to all equities existing between the mortgagor or his grantees and the mortgagee, cannot be applied to those instruments which are properly designated in the recording acts as conveyances, which both a release of a mortgage and an agreement for such release would be, without nullifying the acts to that extent, and withholding the protection they were designed to confer upon purchasers.²

But the record of an assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee.³ It is desirable, for this reason, that personal notice should be given him of the assignment, though the assignee's title is complete without notice to the owner of the equity of redemption.⁴

It has been held that a power of attorney to assign a mortgage,⁵ or one to collect a mortgage and discharge it,⁶ are not within the recording acts, and therefore a record of them is not notice.

473. Statutory provisions as to the record of assignments. It is provided by statute in several states that the recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them to the mortgagee.⁷ In New Jersey, on the other hand, the inference to

¹ *Warner v. Winslow*, 1 Sandf. (N. Y.) Ch. 430; *St. John v. Spalding*, 1 Thomp. & C. (N. Y.) 483.

² *St. John v. Spalding*, 1 Thomp. & C. (N. Y.) 483.

³ *Ely v. Scofield*, 35 Barb. (N. Y.) 330; *N. Y. Life Ins. & Trust Co. v. Smith*, 2 Barb. (N. Y.) Ch. 82. So provided by statute in Wisconsin, Rev. Stat. 1871, p. 1149.

⁴ *Jones v. Gibbons*, 9 Ves. 410; *Barnett, Exp. De G.* 194.

⁵ *Williams v. Birbeck, Hoffm.* (N. Y.) 359.

⁶ *Jackson v. Richards*, 6 Cow. (N. Y.) 617.

⁷ CALIFORNIA: Civ. Code, 1872, § 293; Acts 1874, p. 261.

INDIANA: G. & H. Stat. vol. 2, p. 356.

KANSAS: Dassel's Stat. 1876, c. 68, § 3.

MICHIGAN: Compiled Laws, 1871, p. 1347.

MINNESOTA: Rev. Stat. 1866, p. 331.

NEBRASKA: Gen. Stat. 1873, c. 61, § 39.

NEW YORK: Fay's Dig. of Laws, 1874, vol. 1, p. 585.

OREGON: Gen. Laws, 1872, p. 519.

WISCONSIN: Rev. Stat. 1871, p. 1149.

WYOMING TERRITORY: Comp'd Laws, 1876, c. 3, § 17.

be drawn from the statute in regard to the recording of assignments is that this record is notice to the owner of the equity of redemption; for it is provided that if the assignment be not recorded, any payments made in good faith and without actual notice of the assignment, and any release of the premises to a person not having actual notice of the assignment, are as valid as if the mortgage had not been assigned.¹

It is provided, too, that the record of an assignment of a mortgage is notice from the time it is left for record to all persons concerned; and an assignee by an assignment not recorded is bound by any sale in a foreclosure suit, instituted by the holder of the recorded assignment.

In Dakota Territory an assignment of a mortgage may be recorded in like manner with a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.²

The object of the statutory provisions that the record of an assignment shall not be deemed in itself notice to the mortgagor, his heirs, or personal representatives, of such assignment, so as to invalidate any payment made by him or them to the mortgagee, was to save the necessity of examining the record every time a payment is made. It is argued, therefore, that for all other purposes, the record of the assignment is notice even to the mortgagor. Accordingly it has been held under these provisions that the record of an assignment of a mortgage is constructive notice as against a grantee of the mortgagor, that the mortgagee can no longer deal with the mortgage title; and a subsequent discharge or release of the mortgage executed by the mortgagee is invalid.³ If the release is obtained by the mortgagor himself without the payment of any sum of money upon the mortgage debt, the statute does not protect him against the effect of an assignment already recorded.⁴

474. The consequences of omitting to record an assignment. — As against subsequent purchasers of the premises, or the holders of subsequent mortgages upon them, the record of a prior mortgage is sufficient notice of its existence without the record of

¹ Nixon's Dig. 1868, p. 612.

² Civil Code, 1871, § 1629.

³ *Belden v. Meeker*, 47 N. Y. 307; 2 Lans. (N. Y.) 470.

⁴ *Belden v. Meeker*, *supra*.

an assignment of the mortgage to one who has purchased it. The failure to record the assignment does not blot out the record of the mortgage itself.¹ If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title.² It makes no difference that the assignment is not recorded. If the mortgagee in this condition of the title then conveys the estate to one who purchases without knowledge of the assignment of the mortgage, the question arises whether the assignee, having omitted to record his assignment, thus leaving, so far as the record shows, a complete title in the mortgagee, can be protected in his title as against the purchaser from the mortgagee?³

Of course the purchaser is charged with constructive notice of the existence of a mortgage, and of the continuance of its lien, by its record. Having this information he is chargeable in law with the further notice, that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured by it; but rather that one purchasing the premises would take them subject to the lien of the mortgage irrespective of the ownership of it, unless the mortgagee was the owner. That knowledge and notice made it his duty, in the exercise of proper diligence, to inquire whether his vendor, the mortgagee, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bonâ fide* purchaser.⁴

The rule that a mortgagor is entitled to deal with the mortgagee as the holder of the mortgage, until he has actual notice of an assignment, has no application when the mortgage is given to secure a negotiable note, and this is transferred before it is due.⁵

¹ Campbell v. Vedder, 3 Keyes (N. Y.), 174; 1 Abb. (N. Y.) App. Dec. 295.

² Campbell v. Vedder, *supra*; Purdy v. Huntington, 42 N. Y. 334.

³ This then is the case: "A. sells and conveys land to B. B. gives back a bond and mortgage for the purchase money. A. sells and assigns the bond and mortgage to C., and afterwards receives a conveyance of the equity of redemption from

B., and then by a full covenant deed conveys the land, and all his estate and interest in the land, to D."

⁴ Purdy v. Huntington, 42 N. Y. 334; overruling S. C. 46 Barb. 389; and see Van Kenren v. Corkins, 6 Thomp. & C. (N. Y.) 355; 4 Hun, 129; Gillig v. Maass, 28 N. Y. 191; Warren v. Winslow, 1 Sandf. (N. Y.) Ch. 430.

⁵ Jones v. Smith, 22 Mich. 360.

475. An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption. If he purchases in good faith and for a valuable consideration, he is not chargeable with any notice his assignor had of prior incumbrances upon the property. He is chargeable only with constructive notice, such as is afforded by record, or by open and adverse possession of the premises by another. Constructive notice affects all persons interested alike.¹ Therefore, if the assignee omits to record his assignment, and an elder mortgage of which he had no notice, but of which his assignor had notice, is first recorded, he will hold subject to such elder mortgage; and he would also hold subject to it if such elder mortgage had been recorded before he took the assignment, but after the recording of the mortgage assigned.²

But, on the other hand, it is held in some states that an assignee of a mortgage and bond without notice of any equities affecting it takes it subject to a prior unrecorded mortgage, or to any other equity of which the mortgagee had actual notice.³ In these states it is said that bonds and mortgages have not been placed upon the footing of commercial paper, and that purchasers deal in them at their own risk.⁴

476. Priority between different assignees of the same mortgage. — It is not often that the question of the priority rights under different assignments of the same mortgage can arise, because an assignment is generally accompanied by a delivery of the note or bond secured by the mortgage and of the mortgage itself; and except under peculiar circumstances a person acting in good faith would not take a mere written transfer of the mortgage title without a delivery of these. The fact that the assignor did not have these papers to deliver would be enough ordinarily to put the purchaser on his guard, even if it did not amount to notice to him of a prior assignment. At any rate the absence of these papers would be enough to put in doubt his good faith in taking

¹ Trustees of Union College v. Wheeler, 59 Barb. (N. Y.) 585; Jackson v. Van Valkenburgh, 8 Cow. (N. Y.) 260; Bush v. Lathrop, 22 N. Y. 535, 549; Varick v. Briggs, 6 Paige (N. Y.), 323; Jackson v. Given, 8 Johns. (N. Y.) 137.

² Fort v. Burch, 5 Denio (N. Y.), 187.

³ Conover v. Van Mater, 18 N. J. 481.

⁴ Conover v. Van Mater, *supra*.

the assignment; and would make him chargeable with notice of any defect there may be in the assignor's title.¹

But if two assignments of the same mortgage by any means are made and taken by different persons in good faith, of course the assignee who first records his assignment would gain the better title to the mortgage, if he has paid full value for it at the time of taking it. If he paid only part of the consideration, then he would have priority only to the extent of the payment made by him; for he is then a purchaser, and entitled to protection only to that extent.²

477. Manner of recording an assignment. — When an assignment of a mortgage is indorsed upon the mortgage deed, which is referred to as “the within described mortgage,” it is sufficient to record the assignment without recording the mortgage with it anew.³ A reference is usually made by the register from the record of one instrument to the other; but unless required by law, this is not essential. A recital of the names of the parties to the mortgage, and its date, is a sufficient identification of it; although it is usual in addition to this description, when the assignment is not indorsed upon the mortgage, to refer, in the description of it, to the book and page of the record.

478. The same principles apply equally to the record of any agreement affecting a mortgage. — If not executed with the formalities entitling it to be recorded, the record affords no constructive notice of its contents. If, for instance, land subject to a mortgage is sold, and mortgaged back for the purchase price, the vendor agreeing to pay off the elder mortgage, or in default of so doing to allow the purchaser to pay it, and have the amount of it deducted from the mortgage given for the price of the land, and this agreement without being entitled to be recorded is nevertheless put upon record, and the purchaser subsequently pays the elder mortgage as contemplated by the agreement, an assignee of the mortgage for the purchase money, having no actual notice

¹ Kellogg v. Smith, 26 N. Y. 18; Brown v. Blydenburgh, 7 N. Y. 141.

² Pickett v. Barron, 29 Barb. (N. Y.) 505; Purdy v. Huntington, 46 Barb. (N.

Y.) 389; 42 N. Y. 334; Campbell v. Vedder, 3 Keyes (N. Y.), 174; Bush v. Lathrop, 22 N. Y. 535.

³ Carli v. Taylor, 15 Minn. 171.

of this agreement, is not concluded by it; but may hold his mortgage for the original amount of it.¹

479. The registry laws apply to a mortgage of a growing crop, or to an agreement constituting a lien upon it. A verbal agreement, or an agreement in writing, not recorded, whereby the crop is pledged by a tenant of land to the owner, as security for advances, is of no validity as against a mortgage of it afterwards made and duly recorded.²

2. *Registry Acts of the Several States.*

480. In general. — Although the general effect of the registry acts of the several states is the same, there is considerable difference of detail in them, and no general statement of their provisions would be of any value. It has been thought worth while to give a synopsis of the statutes of each state upon this subject, both on account of the practical use of the statutes themselves, and for the explanation they afford of the want of harmony in the adjudications of different states upon this subject. It has been thought best, also, to give in the form of notes to these statutes, and as intimately connected with them, the provisions of the several states in relation to the acknowledgment of deeds, and the forms of acknowledgment provided by statute or in general use.

481. Alabama.³ — Mortgages and unconditional conveyances

¹ Dutton v. Ives, 5 Mich. 515.

² Jones v. Chamberlin, 5 Heisk. (Tenn.) 210. This case is distinguished from *Tedford v. Wilson*, 3 Head (Tenn.), 311, where it was agreed that the proceeds of a farm should be liable for the wages of a person who entered into possession of it and carried it on for the owner. Being in possession he was held to be entitled to apply the crops to the satisfaction of his claim for wages as against a creditor of the owner, and that the registration act did not apply.

³ ALABAMA. — Acknowledgments and proofs of conveyances may be taken within the state by judges of the supreme and

circuit courts and their clerks, by chancellors, registers in chancery, judges of the courts of probate, justices of the peace, and notaries public. Without the state and within the United States they may be taken by judges and clerks of any federal court, judges of any court of record in any state, notaries public, or commissioners appointed by the governor of this state. Beyond the limits of the United States they may be taken by the judge of any court of record, mayor, or magistrate of any city, town, borough, or county, by notaries public, or by any diplomatic, consular, or commercial agent of the United States. Code, 1867, §§ 1545, 1546.

to secure debts created at the date thereof are void as to subsequent purchasers and incumbrancers having no notice, unless recorded in the office of the judge of probate for the county where the property is situated within three months from their date. Other conveyances to secure debts are void as against subsequent purchasers and incumbrancers, who acquire rights before the recording of them. These provisions include absolute conveyances, with a separate defeasance.¹ The object of the statute being the prevention of fraud, the letter of the statute must often yield to the spirit; thus it is held that actual notice of the existence of a mortgage by a subsequent purchaser or mortgagee,² or by a subsequent judgment creditor,³ is equivalent to registration. Nor is the record of the mortgage essential to its validity as against the mortgagor;⁴ or as against his creditors other than judgment creditors.⁵ The record is in law complete from the delivery of the deed to the recording officer,⁶ and therefore a mistake by him in copying, as to the sum secured by the mortgage, cannot prejudice the mortgagee.⁷

If there be no acknowledgment, a conveyance may be admitted of record on proof, when attested by two witnesses. Conveyances by married women should be attested by two witnesses, or acknowledged. The husband should join. The wife whether of full age or not may release dower by joining her husband in the conveyance, in presence of two witnesses and acknowledging the deed. Ib. §§ 1626, 1628.

The form given by statute, § 1548, is: The State of _____, County of _____. I (name and style of the officer), hereby certify that _____, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day, that being informed of the contents of the conveyance, he executed the same voluntarily, on the day the same bears date. Given under my hand this _____ day of _____, A. D. 18 _____. A. B.

The statute form of proof is as follows, § 1549: The State of _____ County. I (name and style of the officer), hereby certify that _____, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and be-

ing sworn, stated that _____, the grantor in the conveyance, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor, and of the other witness, and that such other witness subscribed his name as a witness in his presence. Given under my hand, this _____ day of _____, A. D. 18 _____. A. B.

¹ Rev. Code, 1867, §§ 1557, 1558; and see *Coster v. Bank of Ga.* 24 Ala. 37; *De Vendal v. Malone*, 25 Ala. 272.

² *Wyatt v. Stewart*, 34 Ala. 716; *Boyd v. Beck*, 29 Ala. 703; *Dearing v. Watkins*, 16 Ala. 20.

³ *Wallis v. Rhea*, 10 Ala. 451; 12 Ala. 646; *Jordan v. Mead*, 12 Ala. 247.

⁴ *Smith v. Branch Bank of Mobile*, 21 Ala. 125; *Andrews v. Burns*, 11 Ala. 691.

⁵ *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Daniel v. Sorrells*, 9 Ala. 436; *Center v. P. & M. Bank*, 22 Ala. 743.

⁶ Code, § 1539.

⁷ *Mims v. Mims*, 35 Ala. 23.

482. Arkansas.¹—A mortgage is a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before.² The record must be made in the recorder's office for the county where the land is situate.³

483. California.⁴—Mortgages are acknowledged and recorded

¹ ARKANSAS.—Acknowledgments within the state may be taken before the supreme or circuit court, or either judge or clerk thereof, or before the county court or presiding judge thereof, or any justice of the peace or notary public; elsewhere in the United States, before any court of the United States, or of any state or territory having a seal, or the clerk thereof, mayor or chief officer of any city or town having a seal of office, or notary public; and out of the United States before any court having a seal, or any mayor or chief officer of any city or town having an official seal, or before any officer of any foreign country, who by its laws is authorized to take probate of the conveyance of real estate of his own country, if he have an official seal. Proof of the execution may also be made by one or more of the subscribing witnesses. Dig. of Stat. 1858, c. 37; Acts 1874, p. 53.

In a release of dower the wife should acknowledge, but no separate examination required.

State of _____, County of _____, ss.
Be it remembered, that on this day came before the undersigned (name and title of officer), within and for the county aforesaid duly commissioned and acting _____, to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

And on the same day, also voluntarily appeared before me _____, wife of the said _____, to me well known, and in the absence of her said husband, declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the purposes therein contained and set forth, without compulsion or undue influence of her said hus-

band. Witness my hand and seal, as such (title of officer), on this _____ day of _____, 187 .

(Signature and title of officer.)

² Dig. of Stat. 799.

³ Ib. p. 268.

⁴ CALIFORNIA. — Acknowledgments within the state may be made before a justice or clerk of the supreme court, a judge or clerk of a court of record, a mayor or recorder of a city, a court commissioner, county recorder, notary public, or a justice of the peace; elsewhere in the United States, before a justice, judge, or clerk of a court of record of the United States, any justice or judge of any court of record, a notary public, or by a commissioner appointed by the governor of this state for that purpose; also by any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgement; and out of the United States, before a minister, commissioner, or *chargé d'affaires* of the United States resident and accredited in the country where the proof or acknowledgment is made, or a consul, vice-consul, or consular agent of the United States resident in the country where the proof or acknowledgment is made, or a judge of a court of record of the country where the proof or acknowledgment is made, or commissioner of deeds of this state, or a notary public. Civil Code, §§ 1181, 1182, 1183.

Neither dower nor curtesy exists.

The general form of acknowledgment given by statute (§ 1189) is: State of _____, County of _____, ss. On this _____ day of _____, in the year _____, before me (name and quality of officer), personally appeared _____, known to me (or proved to me on the oath of _____) to be the person whose

in the same manner as grants of real estate, but the record must be made in separate books kept for mortgages exclusively. Without such record they are void as against subsequent purchasers in good faith for a valuable consideration, whose conveyance is first duly recorded. The mortgagee is allowed, from the date of the mortgage, one day for every twenty miles of the distance between his residence and the county recorder's office, where the mortgage ought to be recorded, during which time the mortgage has the same effect as if recorded. Every grant which appears by any other writing to be intended as a mortgage must be recorded as such, and if the grant and other writing are not recorded together, at the same time and place, the grantee can derive no benefit from such record. When a grant purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, the defeasance must be recorded in order to defeat or affect the absolute grant as against any person other than the grantee, his heirs, or devisees, or persons having actual notice.¹

The provision of the Code, allowing the mortgagee one day for every twenty miles between his residence and the recording office for recording his deed, is subject to the provision that the mortgage or conveyance first recorded takes precedence.²

484. Colorado.³ — Mortgages are recorded in the office of the

name is subscribed to the within instrument, and acknowledged to me that he executed the same.

(Seal.) (Signature and title.)

A married woman need not join in the mortgage unless the property is the homestead, or her separate estate. Her acknowledgment is the same as the above, except in place of the termination commencing "and acknowledged," say, "described as a married woman; and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution."

(Seal.) (Signature and title.)
Civil Code, § 1191.

¹ Civil Code, 1872, §§ 1214, 2937, 2949, 2950, 2952.

² *Odd Fellows Sav. Bank v. Banton*, 46 Cal. 603.

³ COLORADO.—Acknowledgments within the state may be taken before any justice of the supreme or district courts, or any clerk of either of said courts, or the deputy of any such clerk, or before the probate judge of any county, such probate judge and clerks certifying under the seal of court; before any clerk of any county or his deputy under the seal of the county; before any notary public under his notarial seal; or before any justice of the peace within his county, though when the lands do not lie in his county, a certificate of his official capacity under the hand of the clerk of that county and the

recorder of the county where the land is situate, and from the time of filing of the same take effect as to subsequent *bonâ fide* purchasers and incumbrancers not having notice. Conveyances are deemed to be notice from the time of filing for record, though not acknowledged or proven according to law; but cannot be offered in evidence unless subsequently acknowledged or proved according to law.¹

485. Connecticut.²—No mortgage is effectual to hold lands,

seal of court must be affixed. Elsewhere in the United States they may be taken before the secretary of any state or territory under the seal of such state or territory; before the clerk of any court of record of such state or territory, or of the United States, having a seal, under the seal of such court; before any officer authorized by the laws of such state or territory to take and certify such acknowledgments, provided there be affixed a certificate by the clerk of some court of record of the county, city, or district, where the officer resides, under the seal of court, that he is the officer he assumes to be, that he has authority by the laws of such state or territory to take and certify such acknowledgment, and that his signature to the certificate of acknowledgment is his true signature; or before a commissioner of deeds appointed under the laws of this state, certified under his official seal. Out of the United States, before any court of record having a seal, the judge or justice certifying it under the seal of such court; before the mayor or other chief officer of any city or town having a seal, or before any consul of the United States, certified under the seal of the consulate. Rev. Stat. 1868, c. 17, § 13.

Dower abolished. Wife need not join in husband's deed, or husband in wife's.

Form of certificate: State of _____, County of _____, ss. I (naming officer), within and for the county and state aforesaid, do hereby certify that _____, who is personally known to me (who was proven to me by the oath of _____, a credible witness), to be the same person whose name is subscribed to the foregoing (or within)

instrument of writing as a party thereto, appeared before me this day in person, and acknowledged that he executed the same for the uses and purposes therein set forth. Witness my hand and seal of said court this _____ day of _____, A. D. 187_____.

(Signature.)

¹ Rev. Stat. 1868, pp. 111, 112.

² CONNECTICUT. — Acknowledgments within or without the state may be made before a justice of the peace, notary public, judge of a court of record of this state or of the United States; commissioner of the school fund, commissioner of the superior court, town clerk, or assistant town clerk; in any other state or territory of the United States, before a commissioner appointed by the governor of this state and residing therein, or before any officer authorized to take the acknowledgment of deeds in such state or territory. Out of the United States they may be made before a United States consul, notary public, or justice of the peace. A notarial seal is generally accepted without further proof of official character. An acknowledgment by a justice of the peace should be accompanied by a certificate of his official capacity under the hand of the county clerk. Gen. Stat. 1875, pp. 352, 353.

No separate examination of wife.

The certificate may be as follows: State of _____, County of _____, A. D. 187_____. Then and there before me _____, duly commissioned and acting as such, personally appeared _____ and his wife, signors and sealers of the foregoing instrument, and severally acknowledged the same to be their free act and deed before me.

against any other person but the mortgagor and his heirs, unless recorded on the records of the town where the lands lie. A record of an unacknowledged deed, or of any instrument creating an equitable interest, is notice to all the world of an equitable interest. All conveyances of lands of which the grantor is ousted by the entry and possession of another, unless made to the person in actual possession, are void.¹ Possession by a mortgagee is not, however, adverse.²

486. Dakota Territory.³ — Mortgages are recorded with the register of deeds for the county where the land lies. The record is made in books kept exclusively for mortgages. The conveyance made in good faith and for a valuable consideration which is first recorded has precedence. The record is notice to all subsequent purchasers and incumbrancers. Every grant which appears by any other writing to be intended as a mortgage must be recorded as such; and if such grant and other writing explanatory of its

Witness my hand and seal of office, on this day of , 187—.

(Signature and title.) (Seal.)

¹ Revision 1875, pp. 353, 354.

² *Sanford v. Washburn*, 2 Root (Conn.), 499.

³ **DAKOTA TERRITORY.** — Acknowledgments within the territory may be made before a judge of a court of record, a mayor or recorder of a city, justice of the peace, commissioner of deeds, notary public, probate judge, or any public officer having an official seal; without the territory, before a judge of the superior court or of a district court of the United States, a judge of the supreme, superior, or circuit court of any state or territory where the acknowledgment is made who is authorized by its laws to take acknowledgments, or a commissioner appointed by the governor of this territory for the purpose, or before any public officer having a seal. Civil Code, §§ 517, 518; Laws 1872-3, c. 31.

Where the certificate of any officer without the territory is made under his hand and seal, no further authentication is necessary. An acknowledgment without the

United States may be made before any diplomatic officer or consul of the United States resident in the country where it is made; or before a judge of the highest court of any of the British American provinces; or before the mayor or chief magistrate of any city in the British Islands. Civil Code, § 519.

Dower and curtesy are abolished. In a release of homestead, or conveyance of her own property executed within the territory, the wife should acknowledge after a separate examination. Civil Code, §§ 521, 522.

Form of certificate: —

Territory of , County of , ss.
On this day of , in the year 187—, before me personally comes A. B. and C. D. his wife, to me known to be the individuals described in, and who executed the within instrument, and severally acknowledged that they executed the same for the purposes therein mentioned. And the said C. D. on a private examination by me made, apart from her husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband. (Signature and title.)

true character are not recorded together at the same time and place, the grantee can derive no benefit from such record.¹

487. Delaware.²—Mortgages and conveyances in the nature of mortgages have priority according to the date of record in the recorder's office for the county. If two or more mortgages of the same premises are lodged in the office at the same time, they stand in priority according to their respective dates. A mortgage, for purchase money recorded within sixty days after making it has precedence to any judgment or other lien of prior date.³

If there be a conveyance absolute on the face of it, and also a defeasance or written contract in the nature of a defeasance, or for a reconveyance of the premises or any part of them, the person to whom such conveyance is made must cause to be indorsed thereon and recorded therewith a note stating that there is such defeasance or contract, and the general purport of it, or the recording of such conveyance is of no effect; and such defeasance or contract must be duly acknowledged or proved, and recorded in the recorder's office for the county within sixty days after the day of making the same, or it will not avail against a fair creditor, mortgagee, or purchaser for a valuable consideration from the person to whom the conveyance is made; unless it appear that such creditor when giving the credit, or such mortgagee or purchaser

¹ Civil Code, 1871, §§ 530, 1626–1628.

² DELAWARE. — Acknowledgments in the state may be taken in the superior court, or before the chancellor, or any judge, notary public, or before two justices of the peace for the same county.

Acknowledgments out of the state may be made before any consul-general, consul, or commercial agent of the United States duly appointed in any foreign country, at the places of their official residences, or before any judge of a district or circuit court of the United States, or the chancellor, or any judge of a court of record, or the mayor or chief officer of any city or borough, and certified under the hand of such officer and the seal of his office, court, city, or borough; or in open court, certified under the hand of the clerk and seal of the court; or before a commissioner of deeds appointed by the governor. Rev. Stat. 1874, pp. 501, 502.

The wife in release of dower should acknowledge after a separate examination.

Form of certificate given by statute, p. 502, § 9 :—

State of _____, County of _____, ss. Be it remembered that on this _____ day of _____, A. D. _____, personally came before the subscriber (name and title) _____ and _____ his wife, parties to this indenture, known to me personally (or proved on the oath of _____) to be such, and severally acknowledged said indenture to be their act and deed respectively, and that the said _____, being at the same time privately examined by me apart from her husband, acknowledged that she executed the said indenture willingly, without compulsion, or threats or fear of her husband's displeasure. Given under my hand and official seal the day and year aforesaid.

(Signature and title.)

³ Rev. Code, 1874, p. 504.

when advancing the consideration, had notice of such defeasance or contract.¹

488. District of Columbia.² — Conveyances of land are recorded in the office of the recorder of deeds. All deeds, except deeds of trust and mortgages, recorded within six months after delivery, take effect and are valid as to all persons from the time they are duly acknowledged or proved. All deeds of trust and mortgages whenever delivered for record, and other conveyances delivered within six months after delivery, take effect and are valid, as to all subsequent purchasers for valuable consideration, without notice, and as to all creditors from the time when such deed of trust or mortgage, or other conveyance, shall have been so acknowledged or proved, and delivered to the recorder for record, and from that time only. Of two or more deeds of the same property delivered for record on the same day, that which was first sealed and delivered has preference in law.³

489. Florida.⁴ — No mortgage is good or effectual in law or in

¹ Rev. Code, 1874, p. 504.

² DISTRICT OF COLUMBIA. — Acknowledgments within the United States may be made before any judge of a court of record and of law, any chancellor of a state, any judge of the supreme, circuit, district, or territorial courts of the United States, any justice of the peace, notary public, or commissioner of the circuit court of the district appointed for the purpose. When taken out of the district there must be a certificate of the register, clerk, or other public officer having cognizance of the fact, under his official seal, that at the date of the acknowledgment the officer was in fact the officer he purported to be. Acknowledgments in a foreign country may be made before any judge or chancellor of any court, master in chancery, or notary public, or before any secretary of legation or consular officer of the United States. The official character of the officer must be duly certified. Rev. Stat. 1873, p. 52.

The form of certificate (Ib. p. 52) is as follows: " County, to wit. I, A. B. (title), in and for the county aforesaid, in the state of , do hereby certify that C. D., a party to a certain deed, bearing

date on the day of , and hereto annexed, personally appeared before me in the county aforesaid, the said C. D. being personally known to me, as (or proved by the oaths of credible witnesses before me to be) the person who executed the said deed, and acknowledged the same to be his act and deed. Given under my hand and seal this day of .

"A. B. (Seal)."

A married woman must be examined privily and apart from her husband, and the deed must be fully explained to her. Ib. p. 53.

The certificate of acknowledgment of a married woman should, in addition to the foregoing, say: "And being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her free act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it."

³ Rev. Stat. 1873, pp. 52, 53.

⁴ FLORIDA. — Acknowledgments may be made before any judge, clerk of the circuit court, notary public, or justice of the peace,

equity against creditors or subsequent purchasers for value without notice unless recorded; and in order to be entitled to record, its execution by the party making it must be acknowledged by him, or proved upon oath by at least one of the subscribing witnesses, before the officer authorized by law to record the deed, or before some judicial officer of the state. If executed by attorney, the power of attorney must be proved and recorded at the time of recording the mortgage.¹

490. Georgia.²— A mortgage must be executed in the presence of, and attested by or proved before, a notary public or jus-

within the state, or before any judge or clerk of a court of record, notary public, justice of the peace, or other officer authorized by the laws of any state or territory or district of the United States to take acknowledgments of deeds therein, or before any commissioner appointed by the governor of this state for that purpose. In a foreign country acknowledgment may be made before any notary public therein, or diplomatic officer or consul of the United States appointed to reside therein, or before a commissioner appointed by the governor of this state for such purpose. The certificate, when made in another state or country, must in all cases be under the hand of the officer and his seal of office; but if the officer has no official seal, his official character must be properly certified. Acts 1873, p. 18. And see Bush's Dig. p. 152. A wife may relinquish dower by joining with her husband, or by separate deed attested by two witnesses. She must also acknowledge before some judicial officer or notary public of the state, that the relinquishment was made freely and voluntarily, and without compulsion, constraint, apprehension, or fear of or from her husband. Out of the state this acknowledgment must be made before a clerk of some court of record, in the presence of a judge or justice of the court, who shall certify that the acknowledgment was made in his presence, and that the clerk is a clerk of that court. In a foreign country it must be made before a diplomatic officer, or consul, or commercial agent, of the

United States, and certified under his hand and official seal. Bush's Dig. p. 149.

The certificate must show that the examination of the wife was in accordance with this statute, made in the presence of the required officers.

As to the form of the certificate in general, it must substantially set forth the matter required to be done to make the acknowledgment effectual. Bush's Dig. p. 153.

¹ Bush's Dig. of Laws 1872, p. 151; and see Laws, 1873, p. 18.

² GEORGIA. — In order to admit a deed to be recorded, it must be attested, if within the state, by a judge of a court of record, a justice of the peace, a notary public, or clerk of the superior court. No official seal is necessary. Out of the state it must be attested by a commissioner of deeds for this state, or a consul or vice-consul of the United States, the certificates of these officers under their seals being evidence that they are such; or by a judge of a court of record in the state where executed, with a certificate of the clerk, under the seal of such court, of the genuineness of the signature of such judge. Code, 1873, § 2706.

There is no necessity for renunciation of dower to estates acquired since 1866. A married woman may release dower by joining in the deed with her husband, and acknowledging her voluntary act in signing before the attesting officer at a private examination.

The certificate may be as follows: —

State of _____, County of _____, ss. Be-

tice of any court in this state, or a clerk of the Superior Court, and by one other witness, and be recorded within three months from its date in the county where the land lies in the office of the clerk of the Superior Court. If not recorded within the time limited, it is valid against the mortgagor, but is postponed to all other liens or purchases made prior to the record without notice of the unrecorded mortgage.¹ A mortgage recorded in an improper office, or without due attestation, or so defectively recorded as not to give notice to a prudent inquirer, is not notice; but a mere formal mistake in the record does not vitiate it. The due record of a mortgage, though not made within the time prescribed, is notice from the time of record to all the world.²

491. Idaho Territory.³ — Mortgages to operate as notice to third persons must be recorded in the office of the recorder of the county in which the real estate is situate, but are valid and bind-

fore me (name and title of officer), personally came _____, to me known to be the individual whose signature is affixed to the foregoing deed, who being sworn says that he executed the said deed for the purposes therein mentioned, and acknowledges the same to be his true and lawful act.

Sworn to and subscribed before me this _____ day of _____, 187-.

(Seal.) _____ (Signature and title.)

¹ Code, 1873, §§ 1955-1957, 2750; see *Hardaway v. Semmes*, 24 Ga. 305.

² *Ib.* §§ 1959, 1960.

³ **IDAH0 TERRITORY.** — Acknowledgments within the territory may be taken by any judge or clerk of a court having a seal, a notary public, or justice of the peace of the proper county. Elsewhere in the United States they may be taken by some judge or clerk of any court of the United States, or of any state or territory, having a seal, or by any commissioner appointed by the governor of this territory for that purpose. Without the United States they may be taken by some judge or clerk of any court, of any state, kingdom, or empire, having a seal, or by any notary public therein, or by any minister, commissioner, or consul of the United States appointed to reside therein. *Rev. Laws*, 1875, p. 597. There is no dower or

courtesy. A married woman in a conveyance of her separate estate must be made acquainted with the contents of the conveyance, and must "acknowledge, on examination, apart from, and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same." The certificate must set forth the acknowledgment as above, and that such married woman was personally known to the officer to be the person whose name is subscribed to such conveyance as a party thereto, or was proved to be such by a credible witness. *Ib.* p. 600.

Form of certificate given by statute, p. 598, is as follows: —

State of _____, County of _____, ss. On this _____ day of _____, A. D. 18 _____, personally appeared before me (name and title), A. B., personally known to me to be the person described in, and who executed the foregoing instrument (or satisfactorily proved to me to be, &c., by the oath of C. D., a competent and credible witness, for that purpose by me duly sworn), and who acknowledged to me that he executed the same freely and voluntarily and for the use and purposes therein mentioned.

ing between the parties without such record. All conveyances from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees are deemed to purchase and take with notice. Conveyances not recorded are void as against any subsequent purchaser in good faith and for a valuable consideration whose own conveyance is first recorded.¹

492. Illinois.²—Mortgages are recorded in the county in which the real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.³ They take effect and are in force from and after the time of filing for record, and not before, as to all creditors and subsequent purchasers without notice. They are notice from the time of filing for record, though not acknowledged or proven according to law; but cannot be read in evidence unless their execution be proved in the manner required by the

¹ Rev. Laws, 1875, p. 601.

² ILLINOIS. — Acknowledgments in the state may be made before a notary public, or United States commissioner, who must affix his seal; a master in chancery, circuit or county clerk, justice of the peace (the official character of the latter, if he be without the county where the land lies, to be certified by the clerk of the county court), any court of record having a seal, or any judge or justice of it, the seal of the court being affixed. Elsewhere in the United States, before a justice of the peace (his official character being certified as above), notary public, United States commissioner, commissioner of deeds, mayor of a city, or clerk of a county, such officer affixing his official seal, any judge, justice or clerk of any United States, state, or territorial court; or it may be made in conformity with the laws of the state where made, in which case a certificate of conformity from the clerk of a court of record should be annexed. Without the United States it may be before any court having a seal, mayor, or chief officer of any city or town, having a seal, minister, or secretary of legation, or consul of the United States in any foreign country, attested by

his official seal, or any officer authorized by the foreign law to take acknowledgments, his authority being proved, if he has no official seal; or the acknowledgments may be in conformity with the foreign law, and so certified by any consul or minister under his official seal. R. S. 1874, pp. 276, 277.

The wife need not be examined separately.

Form of certificate given by statute. Ib. p. 278:—

State of _____, County of _____, ss.
I (name and title of officer), do hereby certify that _____ and _____ his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instruments as having executed the same, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal, this _____ day of _____, A. D. 18 ____.
(Seal.) (Signature and title.)

³ R. S. 1874, c. 30, § 28.

rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.¹

493. Indiana.²—Mortgages are recorded in the recorder's office of the county where the lands are situated; but if not recorded within ninety days after the execution of them, they are fraudulent and void as against subsequent purchasers or mortgagees in good faith, and for a valuable consideration. When a mortgage is in the form of an absolute conveyance, but is intended to be defeasible by force of a deed of defeasance, bond, or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded within ninety days after the date of the deed.³

Under this statute, when a mortgage has been executed to one person and subsequently a deed is executed to another, and neither is recorded within the prescribed time, the respective liens date from the time of record and not from the date of the instruments.⁴

494. Iowa.⁵—No mortgage is of any validity against subse-

¹ R. S. c. 30, §§ 30, 31.

² INDIANA. — To entitle deeds and mortgages to be recorded, they must be acknowledged or proved before a judge or clerk of some court of record, justice of the peace, auditor, recorder, notary public, mayor of a city, in this or any other state, a commissioner of this state residing in another state, or before a minister, *chargé d'affaires*, or consul of the United States in a foreign country. If the officer has an official seal no further attestation is required. 1 G. & H. Stat. p. 261.

A married woman need not be examined separate and apart from her husband. *Ib.* p. 264,

Form of certificate (the statute form is less formal. See *Ib.* p. 264) : —

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 187 _____,
before me (name and title of officer), personally appeared _____ and _____ his
wife, the grantors in the foregoing deed,

and severally acknowledged the execution of the same.

In witness whereof I have herenunto set my hand and affixed my official seal, the day and year aforesaid.

(Seal.) (Signature and title.)

³ Gavin & Hord's Stat. of Ind. 260, 261.

⁴ Reasoner v. Edmundson, 5 Ind. 393.

⁵ IOWA. — Acknowledgments within the state must be before a court having a seal, or some judge or clerk thereof, or some justice of the peace or notary public. Elsewhere in the United States, before some court of record, or officer holding the seal thereof, or before some commissioner of deeds appointed by the governor of this state, a notary public, or justice of the peace, a certificate of the official character of the latter and of the genuineness of his signature being required. Without the United States the acknowledgment may be before any diplomatic officer or consul of the United States in

quent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of the county in which the land lies. To be deemed lawfully recorded, it must have been previously acknowledged or proved.¹

495. Kansas.²—Mortgages proved or acknowledged and certified according to law are recorded in the office of the register of deeds of the county in which the real estate is situated. The filing of deeds with the register for record is notice to all persons. They are not valid, except between the parties and as to persons having actual notice, until they are deposited for record. If executed under powers of attorney, these must be recorded at the same time.³ A deed absolute in form, but intended to be defeasible, is not affected as against any person other than the grantee, or his heirs or devisees, or persons having actual notice, unless the instrument of defeasance is recorded after due acknowledgment.⁴

any foreign country, who is authorized to issue certificates under the seal of the United States; or before any officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgments of written documents; but the certificate of such foreign officer must be authenticated by one of the above named officers of the United States, whose certificate is sufficient evidence of the qualification of the officer and the genuineness of his certificate. Code, 1873, §§ 1955-1957.

No separate examination of wife required.

Form of certificate, requisites of which are given by statute, Ib. § 1958:—

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 187____, before me (name and title), personally came _____ and _____ his wife, to me personally known to be the identical persons whose names are affixed to the above deed as grantors, and acknowledged the execution of the same to be their voluntary act and deed.

Witness my hand and seal of office this day and year above written.

(Seal.) (Signature and title.)

¹ Code, 1873, §§ 1941, 1942.

² KANSAS. — Acknowledgments in the state may be made before a court having a seal, or a judge, justice, or clerk thereof, or some justice of the peace, notary public, county clerk, or register of deeds, or mayor or clerk of an incorporated city; out of the state, before some court of record, or clerk or officer holding the seal thereof, or before some commissioner to take the acknowledgments of deeds, appointed by the governor of this state, or before some notary public or justice of the peace, or before any consul of the United States resident in any foreign port or country. An acknowledgment taken before a justice of the peace must be accompanied by a certificate of his official character, under the hand of the clerk of some court of record and seal of the court. All deeds executed, acknowledged, or proved in any other state, territory, or country, in conformity with the laws thereof, are valid in this state. Dassler's Stat. 1876, c. 22, §§ 9-15, 25.

There is no dower or curtesy, and no separate examination of wife.

The form of certificate above given for the state of Iowa is sufficient.

³ Dassler's Stat. 1876, c. 22, §§ 19-24.

⁴ Ib. ch. 68, § 2.

496. Kentucky.¹ — No deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, is valid against a purchaser for a valuable consideration, without notice, or against creditors, until acknowledged or proved according to law, and lodged for record. The record is made in the clerk's office of the county in which the property, or the greater part of it, is situated. All *bona fide* deeds of trust or mortgage take effect in the order in which they are acknowledged or proved and lodged for record.² If executed by an attorney under a power, the record of the mortgage is not constructive notice unless the power of attorney be also recorded.³ Although not recorded, a mortgage or deed of trust prevails in equity against a creditor who had notice of it before he acquired a legal title to the mortgaged property.⁴

497. Louisiana.⁵ — Mortgages must be recorded in the mort-

¹ KENTUCKY. — Deeds executed in the state by others than married women may be acknowledged before the clerk of the county court; elsewhere in the United States by the clerk of a court, his deputy, or a notary public, mayor of a city, or secretary of state, or commissioner to take the acknowledgment of deeds, or by a judge under the seal of his court; and out of the United States, before any foreign minister or consul, or secretary of legation of the United States, or by the secretary of foreign affairs, certified under his seal of office, or the judge of a superior court of the nation where the deed is executed. The officer taking the acknowledgment should certify it under his seal of office. Gen. Stat. c. 24, §§ 15, 16, 17.

Deeds of a married woman must be acknowledged before some of the officers before named, who shall explain to her the contents and effect of the deed separately and apart from her husband.

A certificate of acknowledgment taken out of the state should be as follows. C. 24, § 21: —

State of _____, County of _____, ss. I, A. B. (here give title), do certify that this instrument of writing from C. D. and wife E. F. was this day produced to me by the parties, and which was acknowledged by

the said C. D. to be his act and deed; and the contents and effect of the instrument being explained to the said E. F. by me, separately and apart from her husband, she thereupon declared that she did freely execute and deliver the same to be her act and deed, and consented that the same might be recorded.

Given under my hand and seal of office this _____ day of _____, 187 .

(Seal.) (Signature and title.)

² Gen. Stat. 1873, p. 256.

³ Ib. p. 256; *Graves v. Ward*, 2 Duv. (Ky.) 301.

⁴ *Forepangh v. Appold*, 17 B. Mon. (Ky.) 625, 631.

⁵ LOUISIANA. — Acknowledgments out of the state may be made before a commissioner of the state, or may be acknowledged in conformity with the laws of the state where the act is passed. The official character of the person before whom the acknowledgment is made, however, must be properly verified. Acknowledgments in the state may be made before a notary public, or parish recorder, or his deputy. In a foreign country American ministers, *chargés d'affaires* consuls-general, consuls, vice-consuls, and commercial agents, are authorized to act as commissioners, and to use their respective

gage book of the parish where the property is situated. If not publicly inscribed on the records they do not prejudice third persons ; but neither the contracting parties, nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage. The registry preserves the evidence of mortgages during ten years, reckoning from the day of its date ; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.¹ The object of the reinscription is to obviate the necessity of searching for mortgages more than ten years back. To effect it, a new description of the property is necessary ; and a mere reference to the previous mortgage is not sufficient.²

498. Maine.³— Mortgages are not effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice, unless recorded in the registry of deeds for the county or district where the lands lie. A deed purporting to convey an absolute estate cannot be defeated by an instrument intended as a defeasance, as against any other person than the maker, his heirs

seals of office instead of the commissioner's seal. An acknowledgment taken by them when duly certified has the force and effect of an authentic act executed in this state. Rev. Stat. 1870, pp. 117, 118. A married woman, to renounce her interest, must acknowledge out of the presence of her husband.

¹ Rev. Civil Code, 1870, art. 3342-3370. As to the necessity of a separate record of mortgages, see *Perot v. Chambers*, 2 La. Ann. 800 ; *Gillespie v. Cammack*, 3 Ib. 248 ; *Copley v. Dinkgrave*, 7 Ib. 595 ; *Cordeviollé v. Dawson*, 26 La. Ann. 534 ; *Fisher v. Tunnard*, 25 La. Ann. 179 ; *Verges v. Prejean*, 24 La. Ann. 78. As to the necessity of reinscription after a lapse of ten years, see *Barelli v. Delassus*, 16 La. Ann. 280 ; *Liddell v. Rucker*, 13 Ib. 569 ; *Batey v. Woolfolk*, 20 Ib. 385 ; *Kohn v. McHattton*, 20 Ib. 223 ; *Levy v. Mentz*, 23 Ib. 261.

² *Shepherd v. Orleans Cotton Press Co.* 2 La. Ann. 100 ; *Hyde v. Bennett*, Ib. 799 ; *Poutz v. Reggio*, 25 La. Ann. 637.

³ MAINE. — Acknowledgments in the state may be made before a justice of the peace, magistrate, or notary public, in any of the United States, or by a commissioner appointed in any other state by the governor of this state ; or by any United States minister or consul, or any notary public in any foreign country. Rev. Stat. 1871, p. 561. When the wife joins with her husband to release dower, his acknowledgment is sufficient. She need not be examined apart from her husband.

A proper form of certificate, when an acknowledgment is taken out of the state, is :—

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 187____, personally appeared before me (name and title of officer), the above-named _____, and acknowledged the foregoing instrument to be his free act and deed.

In witness whereof I have hereunto set my hand, and affixed my official seal, the day and year aforesaid.

(Seal.) (Signature and title.)

a mortgage, though absolute in terms, is considered a mortgage ; but the person for whose benefit the deed is made can have no benefit or advantage from the recording of it, unless the instrument or writing operating as a defeasance, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded with it.¹ Under this provision a neglect to record the defeasance does not annul and make void the deed, but the grantee loses thereby the benefit which the recording of it would have given him over subsequent purchasers. He derives no benefit from the record.²

Assignments of mortgages may be recorded in the same manner as other conveyances, and the record is made constructive notice.³ This act does not affect equitable assignments made by a transfer of the mortgage debt.⁴

500. Massachusetts.⁵ — Mortgages and other conveyances of real estate must be recorded in the registry of deeds for the county or district where the lands lie. The conveyance is not valid and effectual against any person other than the grantor, and his heirs and devisees, and persons having actual notice, unless so recorded.⁶ When a deed purports to contain an absolute conveyance of any estate in lands, but is made or intended to be made defeasible by a deed of defeasance, bond, or other instrument, for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his

¹ *Ib.* art. 64, § 1.

² *Owens v. Miller*, 29 Md. 144.

³ Act 1868, c. 373.

⁴ *Byles v. Tome*, 39 Md. 461.

⁵ MASSACHUSETTS. — The acknowledgment may be made before any justice of the peace in this state; or before any justice of the peace, magistrate, or notary public, or commissioner appointed for that purpose by the governor of this commonwealth, within the United States, or in any foreign country; or before a minister or consul of the United States in any foreign country. Gen. Stat. c. 89, § 19; Stat. 1867, c. 250. When taken out of the state the official character of any magistrate other than a commissioner of

the state, or a minister of the United States, should be appended.

No separate examination of wife.

The following form of certificate may be used for acknowledgments taken out of the state : —

State of _____, County of _____, ss. On this _____ day of _____, 187____, before me (name and title of officer), personally appeared _____ and _____, and severally acknowledged the foregoing instrument to be their free act and deed, before me.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

(Seal.) (Signature and title.)

⁶ Gen. Stat. 1860, c. 89, §§ 1, 3.

heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance is recorded in the registry of deeds for the county or district where the lands lie.¹ The instrument of defeasance has full effect between the parties without being recorded.²

501. Michigan.³ — Mortgages are recorded in the office of the register of deeds of the county where the land lies. They are entered in separate books kept for that purpose. If not recorded they are void against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. A deed absolute in terms, but intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, is not defeated or affected thereby, as against any person other than the maker, his heirs or devisees, or persons having actual notice, unless the defeasance is recorded.⁴

502. Minnesota.⁵ — Mortgages must be recorded in the office

¹ *Ib.* § 15. It would seem that the instrument of defeasance need not be acknowledged before being recorded. *Stetson v. Gulliver*, 2 Cush. 494, 497; but see *Dole v. Thurlow*, 12 Met. 157, 163, per Shaw, C. J.

² *Bayley v. Bailey*, 5 Gray, 505, 510.

³ **MICHIGAN.** — Within the state the acknowledgment may be before any judge or commissioner of a court of record, notary public, or master in chancery, and a certificate indorsed on the deed. When executed in any other state, territory, or district of the United States, the execution may be according to the laws of such state, territory, or district, and acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer there authorized to take the acknowledgment of deeds, or before any commissioner appointed by the governor of this state for such purpose. *Compiled Laws*, 1871, p. 1342, §§ 8 & 9. Unless taken before such commissioner, there must be attached to the deed a certificate of the clerk of a court of record of the county or district, or of the secretary of state of the state or territory, under seal, that the person whose

name is subscribed to the certificate was, at the date thereof, such officer as he is therein represented to be, that he believes the signature of such person to be genuine, and that the deed is executed according to the laws of such state, territory, or district. *Laws* 1875, p. 259. A deed executed in a foreign country may be executed according to the laws of that country, and acknowledged before any notary public, or any diplomatic officer, commissioner, or consul of the United States appointed to reside there; which acknowledgment must be certified by the officer under his hand, and if taken before a notary public, his seal of office must be affixed.

When a married woman within the state joins in the deed, her acknowledgment is to be taken separately from her husband, to the effect that she executed the deed freely, and without any fear or compulsion. A deed executed by a married woman residing out of the state has the same effect as if she were sole, and may be acknowledged in the same way. *Ib.* p. 1343.

⁴ *Compiled Laws*, 1871, pp. 1345, 1346.

⁵ **MINNESOTA.** — Acknowledgments in the state must be made before a judge of

of the register of deeds of the county where the land is situated ; and if not so recorded are void, as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded, or as against any attachment or judgment obtained at the suit of any person against the person in whose name the title to the land appears of record. When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the instrument of defeasance is recorded.¹

503. Mississippi.²—Deeds of trust and mortgages are void

the supreme, district, or probate court, or a clerk of said courts, or before a notary public, justice of the peace, register of deeds, court commissioner, or county auditor, and when such officer has a seal of office this must be affixed. Laws 1876, p. 59. Elsewhere in the United States they may be taken before any justice of the supreme court of the United States, judges of the district courts of the United States, the judges or justices of the supreme, superior, circuit, or other court of record of any state, territory, or district ; or before the clerks of these several courts ; or before justices of the peace, notaries public, or commissioners appointed by the governor of this state for such purpose ; but when taken before an officer not having a seal of office, a certificate of his official character should be annexed. Laws, 1868, p. 100 ; 1869, p. 79.

An acknowledgment in a foreign country may be taken according to the laws of the country before any notary public, or diplomatic officer, commissioner, or consul of the United States resident therein. If before a notary public, his official seal must be annexed. Laws 1868, p. 104, and c. 40, § 10 Gen. Stat.

No separate acknowledgment by wife required.

Form of certificate by husband and wife :

State of _____, County of _____, ss. On

this _____ day of _____, A. D. 187 _____, before me personally appeared _____, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same freely and voluntarily, for the uses and purposes therein expressed.

Witness my hand and official seal the _____ day and year before written.

(Signature and title.)

¹ Revision, 1866, pp. 330, 331.

² MISSISSIPPI.—Acknowledgments in the state may be made before any judge of the supreme or circuit court, any chancellor, any clerk of a court of record, who shall certify the same under the seal of his office ; or any justice of the peace, or member of the board of supervisors, whether the lands be within his county or not. In another state, the acknowledgment may be before any of the justices of the supreme court of the United States, or a district judge of the United States, or justices of the supreme court or superior court of any state or territory of the Union ; or any justice of the peace, whose official character shall be certified under the seal of some court of record in his county ; or before any commissioner of this state appointed for the purpose, or before any notary public or clerk of a court of record having a seal of office.

The wife must be examined privately

as to all creditors and subsequent purchasers, for valuable consideration without notice, unless they are acknowledged or proved, and lodged with the clerk of the Chancery Court of the county in which the lands are situate, to be recorded; but as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration, they are, nevertheless, valid and binding. Deeds of trust and mortgages take effect and are valid only from the time they are delivered to the clerk to be recorded; though other conveyances, if so delivered within three months after execution, take effect from the date of their execution.¹

All instruments conveying both real estate and personal property, as growing crops, must be recorded in the regular deed books of the proper county, and also in a chattel deed book.²

504. Missouri.³—Mortgages must be recorded in the office

and apart from her husband. Rev. Code, 1871, p. 505, 506.

Form of certificate adopted from statute form. Ib. p. 505:—

State of _____, County of _____, ss. Personally appeared before me (name and title of officer), the within named _____ and _____ his wife, who acknowledged that they signed, sealed, and delivered the foregoing deed; and the said _____ wife of said _____, on a private examination apart from her said husband, acknowledged that she signed, sealed, and delivered the foregoing deed, as her voluntary act and deed freely, without any fear, threats, or compulsion of her said husband, on the day and year therein mentioned.

Given under my hand and seal this _____ day of _____, A. D. 187 .

(Signature and title.)

¹ Rev. Code, 1871, p. 503.

² Laws 1876, p. 100.

³ MISSOURI. — Acknowledgments in the state may be before a court having a seal, or some judge, justice, or clerk thereof, notary public, or justice of the peace of the county where the estate lies; out of the state, before a commissioner of the state, notary public, court of record of the United States, or of any state or territory having

a seal, or clerk of any such court; and if in a foreign country, before any court of any state, kingdom, or empire, having a seal, or the mayor or chief officer of any city or town having an official seal, or before a minister or consul of the United States, or a notary public having a seal. Gen. Stat. 444, 445; Wagner's Stat. 1872, p. 274. A notary public within the state must, in his certificate, state when he was qualified and when his certificate will expire.

Form of certificate by husband and wife (see statute form, Wagner's Stat. p. 1418):

State of _____, County of _____, ss. On this _____ day of _____, A. D. _____, before me (name and title), duly commissioned and qualified, came _____ and _____ his wife, who are personally known to me (who were proven before me by the testimony on oath of _____, residing at _____, and _____, residing at _____, two good and credible witnesses) to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same to be their act and deed for the purposes therein mentioned; and she the said _____, wife of said _____, having been by me first made acquainted with the contents of said in-

of the recorder of the county in which the real estate is situated. From the time of filing with the recorder for record, the instrument imparts notice to all persons of its contents. Until so deposited it is not valid, except between the parties, and as to such as have actual notice.¹

505. Montana Territory.²— Mortgages and other conveyances are recorded in the office of the recorder of the county where the real estate is situated, but are valid and binding between the parties without such record. Every such recorded instrument, from the time of filing the same for record, imparts notice to all persons

strument, acknowledged upon an examination separate and apart from her said husband, that she executed said instrument and relinquished her dower in the real estate therein conveyed freely, and without compulsion or undue influence on the part of her husband.

In witness whereof I have hereto set my hand and official seal the day and year last above written.

(Signature and title.)

The certificate is the same in case the land is the separate property of the wife, except that the words "and relinquished her dower" are omitted.

¹ Wagner's Stat. 1872, p. 277.

² MONTANA TERRITORY. — Acknowledgments within the territory may be taken by some judge or clerk of a court having a seal, or by some notary public, or justice of the peace. The certificate of the judge or clerk of court must be under the seal of court, and of the notary under his official seal; and if the property is not in the county for which the justice of the peace is an officer, his official character must be certified to under the hand and official seal of the county clerk of the county where the justice acts. Elsewhere in the United States the acknowledgment may be before some judge or clerk of any court of the United States, or of any state or territory having a seal, or by a notary public, or a justice of the peace, or by any commissioner appointed by the governor of the territory for that purpose. The certificate must be under the hand and official seal of

the officer or of the court, except in case of a justice of the peace, whose official character must be certified under the seal of the court or officer within the county having cognizance of his official character. Laws 1872, p. 397, and Laws 1876, p. 116, §§ 5, 6.

Form of certificate given by statute, *Ib.* p. 398: —

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 18____, personally appeared before me (name and title), in and for said county, A. B., personally known to me (satisfactorily proved to me by the oath of C. D., a competent and credible witness, for that purpose by me duly sworn) to be the person described in, and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

The certificate of acknowledgment by a married woman should set forth that such married woman was personally known to the officer to be the person whose name is subscribed, or was proved to be such by a credible witness, whose name must be inserted, and "that she was made acquainted with the contents of such conveyance, and acknowledged, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same." *Ib.* p. 400.

of its contents, and subsequent purchasers and mortgagees are deemed to purchase and take with notice. If not so recorded, it is void as against any subsequent purchaser in good faith and for a valuable consideration, whose own conveyance is first recorded.¹

506. *Nebraska.*² — Mortgages are recorded with the county clerks, who are registers of deeds, in the county in which the real estate or any part of it is situate; but in case the county is not organized, then in the county to which it is attached for judicial purposes. Mortgages and absolute deeds, intended to operate as such, must be recorded in books kept for the purpose.³ The deed is considered as recorded from the time it is delivered to the clerk for that purpose; and takes effect from that time, and not before, as to all creditors and subsequent purchasers in good faith without notice; but as between the parties is valid without record.⁴ A deed which appears by any other instrument in writing to be intended only as a security in the nature of a mortgage, though absolute in terms, is considered as a mortgage; but the person for whose benefit such deed is made shall not derive any advantage from the recording of it, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time.⁵

507. *Nevada.*⁶ — A mortgage, to operate as notice to third

¹ Laws 1872, pp. 400, 401.

² NEBRASKA. — Acknowledgments may be made in the state before a judge or clerk of any court, or some justice of the peace, or notary public; but the officer cannot act out of his jurisdiction; elsewhere in the United States it may be made according to the laws of the state, territory, or district where the act is done, before any officer authorized to do so by the laws of such state, territory, or district, or before a commissioner appointed by the governor of this state for that purpose. If the officer uses an official seal, the instrument may be recorded without further authentication; in other cases, a certificate of the clerk of a court of record or other certifying officer of the county, district, or state, as to the official character of the officer, the

genuineness of his signature, and that the execution and acknowledgment are according to the laws of such state, district, or territory, must be annexed. In a foreign country a deed may be executed and acknowledged according to the laws of such country, before any notary public, or any diplomatic officer or consul of the United States appointed to reside therein; but when taken before a notary public his seal of office must be affixed. Gen. Stat. 1873, c. 61, §§ 1-13. No separate examination of wife is required.

³ Gen. Stat. 1873, c. 13, § 44, 48.

⁴ Ib. c. 61, §§ 15, 16.

⁵ Ib. c. 61 § 25.

⁶ NEVADA. — Acknowledgments in the state may be made before some judge or clerk of a court having a seal, or some no-

persons, must be recorded in the office of the recorder of the county in which the real estate is situated, but is valid and binding between the parties without such record. From the time of filing for record, it imparts notice to all persons of its contents. Subsequent purchasers and mortgagees have constructive notice of all properly recorded conveyances.

508. New Hampshire.²—Mortgages and other conveyances are recorded in the registry of deeds in the county in which the lands lie. A deed may be recorded though not acknowledged, and for sixty days after such recording it is as effectual as if duly acknowledged.³

Every conveyance of lands, made for the purpose of securing the payment of money or the performance of any other thing

tary public, or justice of the peace; elsewhere in the United States, before a judge or clerk of a court of the United States, or of any state or territory, having a seal, or some notary public or justice of the peace, or by a commissioner appointed by the governor of this state for that purpose; but when taken before a justice of the peace, it must be accompanied by the certificate of the clerk of a court of record of the county having a seal, showing his official character and the genuineness of his signature. Out of the United States it must be taken before some judge, or clerk of a court of a state, kingdom, or empire, having a seal, or a notary public therein, or by a minister, commissioner, or consul of the United States appointed to reside therein. Compiled Laws, 1873, § 231.

The form of certificate for husband and wife is substantially the same as that used in California. The substance of the certificate is prescribed, §§ 250, 251. Dower and curtesy are both abolished. In conveying her separate property a married woman must acknowledge upon a separate examination.

The ordinary form of certificate is prescribed by statute, § 236:—

State of _____, County of _____, on this _____ day of _____, A. D. _____, personally appeared before me (name and title), in

and for said county _____, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

¹ Compiled Laws, 1873, §§ 252, 254. *Grellett v. Heilshorn*, 4 Nev. 526.

² NEW HAMPSHIRE. — Acknowledgments, whether within or without the state, may be made before a justice, notary public, or commissioner; but when before a justice without the state, his official character should be authenticated by the clerk of a court of record or secretary of state. They may also be taken before a minister or consul of the United States in a foreign country. Gen. Stat. 1867, p. 251. No separate acknowledgment of the wife required, or examination apart from her husband. She should acknowledge with the husband.

Form of certificate:—
State of _____, County of _____, ss. Personally appeared the above named _____ and _____ his wife, and acknowledged the foregoing instrument to be their voluntary act and deed. Before me this _____ day of _____, 187 _____.
(Signature and seal.)

³ Gen. Stat. 1867, c. 121, §§ 1-7.

stated in the condition of it, is a mortgage; but the conveyance cannot be defeated, or the estate incumbered, by any agreement, unless it is inserted in the condition of the conveyance, and made part of it, and the condition must state the sum of money secured, or other thing to be performed.¹

509. *New Jersey*.²—Mortgages are recorded in the office of the clerk of the Court of Common Pleas for the county in which the lands lie. If any deed be expressed in absolute and unconditional terms, but it appears by any other writing to have been intended by way of a mortgage, the deed is considered and registered as such; but the grantee is not entitled to the benefits and advantages given by means of the record to a mortgagee, unless an abstract of the writing, operating as a defeasance of the deed, or explanatory of the intention of the parties, that it should have the effect of a mortgage, be also registered with it.³

A mortgage has no effect against a subsequent judgment creditor, or *bonâ fide* purchaser, or mortgagee, for a valuable considera-

¹ *Ib.* ch. 122, §§ 1, 2.

² *NEW JERSEY*.—Acknowledgments within the state are made before a chancellor, or a justice of the supreme court, a master in chancery, a judge of the court of common pleas, or a commissioner of deeds; out of the state, before a judge of United States, supreme, or district courts, chancellor of state or territory where taken, judge of supreme, superior, circuit, or district court of the state, none of whom are required to affix a seal; a mayor or other chief magistrate of a city, under the seal of the city; a master in chancery of New Jersey, a commissioner of deeds for the state residing in another state or territory, under his seal; a judge of the court of common pleas, or before any judge of any court of record, or any officer authorized by the laws of said state or territory to take acknowledgments of deeds in such state or territory; but when taken before such common pleas, or such judge of a court of record, or other officer, there shall be annexed a certificate under the great seal of the state or territory, or under the seal of the court of the county, of the of-

ficial character of the officer, that he was authorized to take acknowledgments, and of the genuineness of his signature. The acknowledgment may be taken before any officer in another state, or in any territory, who is authorized by the laws thereof to take acknowledgments for such state or territory; but a certificate under the seal of the state or territory; or under the seal of some court of record, that such officer was at the time authorized by law to take acknowledgments must be annexed. *Laws* 1876, p. 71. In a foreign country, they may be taken before any court of law, mayor, or other chief magistrate of any city, borough, or corporation, certified in the manner such acts are usually authenticated; or before any diplomatic officer of the United States, any consul, or vice-consul, certified under his seal. *Nixon's Dig.* 1868, p. 144 *et seq.*

An examination of the wife separate from the husband is necessary.

³ *Nixon's Dig.* 1868, pp. 147, 611. And see *Den v. Wade*, 20 N. J. L. (1 Spen.) 291.

tion without notice, unless so recorded at or before the time of such judgment, or of lodging with the clerk for record of such subsequent mortgage or conveyance. As between the parties the mortgage is valid and operative without record.

510. New Mexico Territory.¹—Conveyances of real estate are registered in the office of the archives of the county in which the land lies. The persons making such instruments, after having signed, certified, and registered them, must give notice of the time of registration in the office of the register to all persons mentioned in the conveyance; and all purchasers and mortgagors are considered in law and equity to have purchased under such notice. The deed is not valid except to the parties interested, and those who have actual notice of the same, until it is deposited in the office of the clerk of the office to be registered.²

511. New York.³—Mortgages and other conveyances of real

¹ **NEW MEXICO TERRITORY.**—Acknowledgments in the territory may be made before any judge, justice of the peace, notary public having a seal, or clerk of a court having a seal; elsewhere in the United States, before any United States court, a court of any state or territory having a seal, or the clerk or judge of any such court, the genuineness of the signature and official character of the judge being certified under the seal of the court by its clerk. Out of the United States it may be made before any court of any state, kingdom, or empire, having a seal, or before the magistrate or supreme power of any city having a seal, before any court of record having a seal, before any notary public having a seal, any consul or vice-consul of the United States having a seal, or before the judge of any court of record having a seal, his official character and the genuineness of his signature being certified by some officer having a seal of office. Compiled Laws, 1865, p. 282; Acts 1874, p. 32.

There is no dower. In a conveyance of the wife's separate property the husband must join, and the wife's acknowledgment

must be separate and apart from her husband.

Form of certificate by husband and wife:—

State of _____, County of _____, ss. On this _____ day of _____, A. D. 187____, before me, the undersigned, _____ personally came _____ and _____ his wife, to me personally known to be the same persons whose names are signed to and who are parties to the within deed, and acknowledged that they signed, sealed, and executed the same freely and voluntarily for the purposes therein mentioned; and the said _____ being by me first informed of the contents of said deed, confessed, on an examination separate and apart from and independent of her said husband, that she signed, sealed, and executed the same freely and voluntarily, for the purposes therein mentioned, without any compulsion or the illicit influence of her said husband.

Given under my hand and official seal this day and year last above written.

(Seal.) (Signature and title.)

² Compiled Laws, 1865, c. 44.

³ **NEW YORK.**—Acknowledgments may be made before judges of courts of rec-

estate are recorded in the office of the clerk of the county where the real estate is situated ; or in New York, and some other counties, in the office of the register ; and every such conveyance not so recorded is void as against a subsequent purchaser, in good faith and for a valuable consideration, whose conveyance is first duly recorded. Separate books are kept in which all mortgages and all conveyances absolute in terms, but intended as mortgages, are recorded.

Every deed which appears to have been intended only as a security in the nature of a mortgage, though absolute in terms, is considered a mortgage ; but the person for whose benefit the deed is made can derive no advantage from the record of it, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time.¹

ord within their jurisdictions respectively, county judges, surrogates, notaries public, and justices of the peace, at a place within their respective counties ; mayors, recorders, and commissioners of deeds of cities, within their respective cities. Within the state, before judges of United States courts, judges of the supreme, circuit, or superior court of any other state or territory, at a place within the jurisdiction of their courts ; before the mayor of any city, or a New York commissioner, provided the certificate of such commissioner is accompanied by the certificate of the secretary of state of New York, attesting the existence of the officer, and the genuineness of his signature. Commissioners should state in their certificate the day on which, and the city, town, and county within which the proof or acknowledgment is taken. It may also be taken before any officer of any state or territory of the United States authorized by the laws thereof to take proof or acknowledgment, but the officer must have satisfactory evidence that the person making it is the individual described in and who executed the instrument, and he must attach a certificate of his official character and of the

genuineness of his signature, by a clerk of a court for the county.

Acknowledgments in foreign countries may be made before any consul, vice-consul, deputy consul, consular agent, vice-consular agent, or commercial agent, of the United States, and certified under his seal of office. See Fay's Dig. of Laws, 1874, vol. 1, pp. 581, 583, 586, 587.

The execution of a deed within the state by a married woman should be acknowledged by her on a private examination ; but when executed by a non-resident a private examination is not necessary. Ib. 581.

Form of certificate :—

State of _____, County of _____, ss. On this _____ day of _____, in the year 187 _____, before me personally came _____ and his wife, to me known to be the individuals described in, and who executed the within conveyance, and severally acknowledged that they executed the same for the purposes therein mentioned. And the said _____, on a private examination by me made apart from her husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband. (Signature and title.)

¹ Fay's Dig. of Laws, 1876, vol. 1, p. 580.

512. North Carolina.¹ — No deed of trust or mortgage for real estate is valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies.² Under this provision it is held that no notice, however formal and complete, can supply the place of registration. A deed of trust or mortgage is of no validity whatever, either in law or equity, as against purchasers for value and creditors, until duly registered. They take effect only from and after the registration.³

513. Ohio.⁴ — Mortgages are recorded in the office of the re-

¹ NORTH CAROLINA. — The justices of the supreme court, the clerks of the superior court, and notaries public, may take acknowledgments and probates within the state. The wife must be examined separate from her husband in all deeds executed to bar her dower, or to convey her separate estate. Out of the state a commissioner of affidavits appointed by the governor of the state may take acknowledgments, and they may be taken before a commissioner appointed by the probate judge for the special case. Beyond the limits of the United States they may be taken before the chief magistrate of any city in the county where the grantor is; or before any ambassador, minister, consul, or commercial agent of the United States. The official seal of these officers is sufficient authentication of the acknowledgment to admit the deed to record. *Battle's Revisal*, c. 35, §§ 2-8.

² *Battle's Revisal*, 1873, c. 35, § 12.

³ *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. (N. C.) Eq. 584; *Leggett v. Bullock*, Busb. (N. C.) L. 283.

⁴ OHIO. — Acknowledgments may be made before a judge of the supreme court or court of common pleas, a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city, who must certify the same on the same sheet with the instrument; and where the wife also executes the instru-

ment, he must certify that he examined her separate and apart from her husband, and read or otherwise made known to her the contents of the instrument; clerks of court, probate judges, and county surveyors are also authorized to take and certify acknowledgments. *Rev. Stat. c. 34, § 1.*

Deeds executed, acknowledged, or proven out of the state in accordance with the laws of the place where executed, or in accordance with the laws of this state, are as valid as if executed in this state. *Ib. c. 34, § 5.* In a foreign country the acknowledgment may be made before any consul of the United States resident therein who must certify to the acknowledgment in the same manner as when taken in the state. *Ib. c. 34, § 26.*

Form of certificate of husband and wife prescribed. *Ib. c. 34, § 2: —*

State of _____, County of _____, ss. On this _____ day of _____, A. D. 187____, before me (name and title), in and for said county, personally came _____ and _____ his wife, and acknowledged the execution of the foregoing instrument to be their act and deed for the uses and purposes therein mentioned. And the said _____, wife of _____, being examined by me separate and apart from her said husband, and the contents of said instrument made known and explained to her by me, did declare that she did voluntarily sign, seal, and acknowledge the same, and that she was still satisfied therewith as her act and deed.

corder of the county in which the premises are situated, and take effect from the time when the same are delivered to the recorder for record; and if two or more are presented for record on the same day, they take effect in the order of presentation for record.¹ Separate record books are kept for the recording of mortgages, deeds of trust, and powers of attorney for the execution of the same.²

Under this statute mortgages take effect in the order of their delivery for record, although a junior mortgagee had actual notice of the existence of a prior unrecorded mortgage. The statute wholly excludes the doctrine of notice, and makes priority wholly dependent upon the order of record.³

514. Oregon.⁴ — Every conveyance not recorded by the county clerk in the county where the lands lie within five days is void against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance is first duly recorded. Separate

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last above written.

(Seal.) (Signature and title.)

¹ Rev. Stat. S. & C. c. 34, § 57; and see *Doe v. Bank of Cleveland*, 3 McLean, 140.

² *Ib.* § 28. This provision is directory merely. *Smith v. Smith*, 13 Ohio St. 532.

³ *Mayham v. Coombs*, 14 Ohio, 428; *Stansell v. Roberts*, 13 *Ib.* 148; *Bereaw v. Cockerill*, 20 Ohio St. 163, and cases cited. See Declaratory Act of March 16, 1838; S. & C. 469.

⁴ OREGON. — Deeds may be executed in any other state, territory, or district of the United States according to the laws thereof, and acknowledged before any judge of a court of record, justice of the peace, or notary public, or other officer authorized by the laws of such state, territory, or district, to take the acknowledgment of deeds therein, or before any commissioner appointed by the governor of this state for such purpose. When not taken before such commissioner, a certificate of a clerk of a court of record of the county under his seal of office should be attached, certifying the official character of the officer, the

genuineness of his signature, and that the deed is executed according to the laws of such state, territory, or district. General Laws, 1872, pp. 516, 517.

In a foreign country the execution may be according to the laws of that country, and acknowledged before any notary public therein, or any diplomatic officer or consul of the United States appointed to reside therein. A notary public must affix the seal of his office.

Form of certificate: —

State of _____, County of _____, ss. On this _____ day of _____, A. D. 187____, personally came before me (name and title), in and for said county, the within named _____ and _____ his wife, to me personally known to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein named. And the said _____, on examination separate and apart from her said husband, acknowledged to me that she executed the same freely and without fear or compulsion of any one.

Witness my hand and seal this _____ day of _____, 187____.

(Seal.) (Signature and title.)

books are kept for the record of mortgages. When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual knowledge of it, unless the instrument of defeasance has been recorded in the office for the recording of deeds and mortgages of the county where the lands lie.¹

515. Pennsylvania.²—It is provided that no mortgage, or defeasible deed in the nature of a mortgage, shall be good or sufficient to convey or pass any freehold, or inheritance, or estate, for life or years, unless it is recorded in the office for recording deeds for the county within six months after its date.³ But it is

¹ Gen. Laws, 1872, pp. 518, 519.

² PENNSYLVANIA. — Acknowledgments in the state may be taken before justices of the supreme court, judges of the courts of common pleas, mayor, recorder, and aldermen of Philadelphia, Pittsburg, Alleghany, and Carbondale, the recorders of deeds and notaries public, and all justices of the peace. Out of the state, by the mayor or chief magistrate of the city, town, or place where the deed is executed, under the public seal; by any justice or judge of the supreme or superior court, or court of common pleas, or of any court of probate, or court of record of any state or territory in the United States, certified under the hand and seal of the court; by any judge of the United States supreme court or district court; by any officer or magistrate of any state or territory in the United States authorized by the laws thereof to take acknowledgments therein; a certificate of a clerk of court of record of the official character of such officer, and of his authority to take acknowledgments, should be annexed. Acknowledgments may also be taken by ambassadors and other public ministers of the United States under official seal, consuls and vice-consuls of the United States under consular seal; by any notary public in the United States, or in a foreign

country, or by commissioners appointed by the governor of this state. Brightly's Purdon's Dig. 1872, pp. 458-475.

A married woman must acknowledge separate and apart from her husband. Form of certificate:—

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 187 _____, before me (name and title), duly commissioned in and for said county, came _____ and _____ his wife, and acknowledged the foregoing instrument to be their act and deed, and desired the same to be recorded as such. She, the said _____, being of lawful age, and by me examined separate and apart from her said husband, and the contents of said deed being first fully made known to her, did thereupon declare that she did voluntarily and of her own free will and accord sign and seal, and as her act and deed, deliver the same without any coercion or compulsion of her said husband. Witness my hand and seal the day and year aforesaid.

(Seal.) _____ (Signature and title.)

³ Brightly's Dig. 1872, p. 477. This provision was first enacted in 1715, for the protection of subsequent mortgagees and others from loss by secret pledges of property. The six months allowed are calendar months. *Brudenell v. Vaux*, 2 Dall. 302.

held that an unrecorded mortgage is not wholly inoperative. It is good against the mortgagor and subsequent incumbrancers with notice, and a mortgage for purchase money is good against a judgment creditor with actual notice before his debt was contracted.¹ If the mortgage remain unrecorded at the time of the death of the mortgagor, though good against him while he lived, is not good against his creditors after his decease, but must then come in with his general debts.²

With the exception of mortgages for purchase money, no mortgage is a lien until left for record; but when recorded, the priority of lien is according to the priority of record.³ It is the duty of the recorder to indorse the time upon the mortgage when left for record, and to number it; and if two or more are left on the same day, they have priority according to the time they were left at the office for record.⁴

A mortgage for purchase money, if recorded within sixty days from its execution, has priority.⁵ Of two mortgages for purchase money recorded within the sixty days, that which is first recorded has priority.⁶

516. Rhode Island.⁷ — All deeds of trust, mortgages, and other

¹ Nice's Appeal, 54 Pa. St. 200; Mel-lon's Appeal, 32 Pa. St. 121; Britton's Appeal, 45 Pa. St. 172; Speer v. Evans, 47 Pa. St. 141.

² Nice's Appeal, 54 Pa. St. 200; Adams' Appeal, 1 Penn. 447.

³ Brooke's Appeal, 64 Pa. St. 127; Foster's Appeal, 3 Pa. St. 79; Dig. *supra*, p. 478.

⁴ Brooke's Appeal, 64 Pa. St. 127.

⁵ Dig. *supra*, p. 478; Bratton's Appeal, 8 Pa. St. 164.

⁶ Dungan v. Am. &c. L. Ins. Co. 52 Pa. St. 253.

⁷ RHODE ISLAND. — Acknowledgments in the state are made before a senator, judge, justice of the peace, notary public, or town clerk; out of the state, within the United States, they may be made before any judge, justice of the peace, mayor, or notary public in the state where the deeds are executed, or by any commissioner appointed by the governor of this state; and without the limits of the United States,

before any ambassador, minister *chargé d'affaires*, recognized consul, vice-consul, or commercial agent of the United States, or by any commissioner appointed and qualified as aforesaid in the country in which such deeds are executed. Gen. Stat. 1872, pp. 349, 350. The wife must acknowledge separate and apart from her husband. *Ib.* p. 330.

Form of certificate: —

State of _____, County of _____, ss.
On this _____ day of _____, A. D. 187 _____,
before me (name and title), personally ap-
peared _____ and _____ his wife, and the
said _____ acknowledged the foregoing
instrument by him signed to be his free
and voluntary act and deed; and the said
_____ being by me examined privily and
apart from her said husband, and having
said instrument shown and explained to
her by me, declared to me that it is her
voluntary act, and that she does not re-
tract the same.

In witness whereof I have set my hand

conveyances of real estate, are void unless acknowledged and recorded in the office of the town clerk of the town where the lands lie. As between the parties and their heirs they are, however, valid and binding without record.¹ A bond of defeasance or other instrument which may cause any deed to operate as a mortgage must be recorded; otherwise the deed does not operate as a mortgage against any person who may *bonâ fide* and without notice of such incumbrance purchase the real estate conveyed by such deed of the person to whom the same was made; and the person entitled to the defeasance is barred of all right of redemption against such second purchaser.²

517. South Carolina.³—No mortgage or other instrument in writing in the nature of a mortgage of real estate is valid, so as to affect the rights of subsequent creditors or purchasers for valuable consideration without notice, unless the same is recorded in the office of the register of mesne conveyances for the county where the real estate lies within sixty days from its execution.⁴

and seal at _____, the day and year above written.

(Seal.) _____ (Signature and title.)

¹ Gen. Stat. 1872, p. 350.

² *Ib.* p. 355.

³ SOUTH CAROLINA. — Acknowledgments within the state can be taken only before notaries public and trial justices, and without the state by a commissioner of deeds for South Carolina. Rev. Stat. 1873, pp. 114.

Form of certificate of renunciation of dower:—

State of _____, County of _____, ss. I (name and title), do hereby certify unto all whom it may concern that the wife of the within named _____ did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within named _____, his heirs and assigns, all her interest and estate, and also all her right and claim of dower of, in, or

to all and singular the premises within mentioned and released.

(Signed by wife.)

Given under my hand and seal this _____ day of _____, A. D. 187 .

(Seal.) _____ (Signature and title.)

Before a deed is admitted to probate, one of the subscribing witnesses, if within the state, must go before a trial justice or notary public, or without the state, before a commissioner for South Carolina, and make affidavit in the following form, which he must sign:—

State of _____, County of _____, ss. Personally appeared before me _____, and made oath that he saw _____ sign, seal, and deliver the within conveyance for the uses and purposes therein mentioned, and that he with _____, in the presence of each other, witnessed the due execution thereof (Signed.)

Sworn to before me the _____ day of _____, A. D. 187 .

(Seal.) _____ (Signature and title.)

⁴ Rev. Stat. 1873, p. 422. If the mortgage is not recorded within the time lim-

When the same lands are mortgaged at different times, the debts meant to be secured by such mortgages must be paid in the order the same are recorded.¹

This statute, first enacted in 1843, placed subsequent creditors of the mortgagor on the same footing with subsequent purchasers from him. Before that time, a mortgage not recorded, or one which conferred only an equitable right, and was, perhaps, incapable of record, was preferred to a subsequent creditor, though not valid against a subsequent purchaser for valuable consideration without notice.²

518. Tennessee.³—Mortgages and other conveyances of real estate are registered in the county where the land lies, unless it lies partly in two counties, when it may be registered in either; but if it consists of separate tracts, the deed must be registered in each of the counties where any of the tracts lie. The deed has effect between the parties to it, their heirs and representatives, without registration; but as to other persons not having actual

ited it is not a valid lien as against one who subsequently purchases without notice, although it be recorded after the purchase before the purchaser's deed is recorded. *Williams v. Beard*, 1 S. C. 309.

¹ *Ib.* p. 424.

² *Boyce v. Shiver*, 3 S. C. 515.

³ **TENNESSEE.**—Acknowledgments within the state are made before clerks of county courts and their deputies, and notaries public. Elsewhere in the United States, before a commissioner appointed by the governor of this state, a notary public, or any court of record, or any clerk of any court of record. Out of the United States, before a commissioner of Tennessee appointed for such country, a notary public of such country, or a consul, minister, or ambassador of the United States in such country. Code, 1858 and 1871, §§ 2039–2041.

An acknowledgment before a notary, commissioner, consul, minister, or ambassador must be certified under the officer's official seal. Code, § 2043. The official character of a clerk of court should be certified

by the presiding judge of the court. The wife must acknowledge separate and apart from her husband. *Ib.* § 2076.

Form of certificate given by Code, § 2042 :—

State of _____, County of _____, ss.
Before me (name and title), personally appeared the within named bargainor (or other name), with whom I am personally acquainted, and who acknowledged that he executed the within deed (or other instrument) for the purposes therein contained. Witness my hand and seal of office this _____ day of _____, A. D. 187 .

(Official seal.) (Signature and title.)

To the foregoing there should be annexed, for the wife's acknowledgment, a certificate as follows, § 2077 : “ And _____, wife of the said _____, having appeared before me privily and apart from her husband, the said _____ acknowledged the execution of said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or constraint from her said husband, and for the purposes therein expressed.”

notice, it has effect only from the noting for registration on the books of the register. Priority of registration determines priority of right. A conveyance not recorded is void as to existing or subsequent creditors of or *bonâ fide* purchasers from the makers without notice.¹

519. Texas.² — Mortgages and deeds of trust are recorded within the county where the lands are situated, in the office of the clerk of the county court. They take effect and are valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, from the time when so duly recorded; but as between the parties and their heirs, and as to purchasers with notice, or without valuable consideration, they are valid and binding without being recorded.³

520. Utah Territory.⁴ — Mortgages and other conveyances of

¹ Code, 1858, §§ 2032, 2071-2075.

² TEXAS. — Acknowledgments within the state may be made before a notary public, district clerk, or judge of the supreme or district court, and these officers are required to keep a record of the same. Elsewhere in the United States, before a notary public, commissioner of deeds for the state, or some judge or clerk of a court of record having a seal; and without the United States, before some public minister, *chargé d'affaires*, consul, or consular agent of the United States, or notary public. The certificate should in all cases be under the official seal of the officer taking the acknowledgment. There is no dower, and therefore a wife need not join her husband in a sale of his land. In selling her land the husband should join her in executing and acknowledging the deed. Such acknowledgment may be taken before any of the officers above named, except a clerk of court, and except in a foreign country, before a notary public. Paschal's Dig. arts. 1003, 1004, 5024; Laws 1874, p. 155. Certificate of acknowledgment, see Paschal's Dig. art. 1003.

State of _____, County of _____, ss. Before the undersigned (name and title), in and for the county and state aforesaid,

duly commissioned and qualified, personally appeared _____ and _____ his wife, to me well known to be the individuals described in and who executed the foregoing conveyance; and they acknowledged to me that they executed the same for the uses, purposes, and consideration therein stated, and that the same is their act and deed; and the said _____, wife of said _____, having been examined by me privily and apart from her said husband, and having the said deed fully explained to her, she, the said _____, acknowledged the same to be her act and deed, and declared that she had willingly signed and delivered the same, and that she wished not to retract it.

In testimony whereof, &c.

(Seal.) (Signature and title.)

³ Paschal's Dig. arts. 4988, 4994.

⁴ UTAH TERRITORY. — Acknowledgments in the territory may be taken before a judge or clerk of court having a seal, notary public, or county recorder, or by justices of the peace, where the lands are situate. Laws 1874, p. 27. Elsewhere in the United States they may be taken before a judge or clerk of a court of the United States, or of any state or territory having a seal, or a notary public, or a

land are recorded in the office of the county recorder for the county where the lands are situate. They must be attested by at least one witness, and must be duly proved or acknowledged.¹

521. Vermont.²—Mortgages and other conveyances of real property are recorded in the clerk's office of the town in which the lands lie. Unless so recorded, they are not good or effectual in law to hold the lands against any other person but the grantor and his heirs only. When a deed is made by virtue of a power of attorney this must also be recorded, or the deed is without effect and is inadmissible in evidence.³

522. Virginia.⁴—Deeds of trust and mortgages are void as to creditors, and subsequent purchasers for valuable consideration

commissioner of deeds for this territory. Out of the United States they may be taken before a judge or clerk of any court of any state, kingdom, or empire, having a seal, or any notary public, or any minister, commissioner, or consul of the United States appointed to reside therein. A legally appointed deputy of any of the above mentioned officers may take the acknowledgment in the name of the principal. Dower was abolished, Feb. 18, 1872; Laws, p. 27. A married woman may convey her own real estate as a *feme sole*.

The form of certificate is the same as that prescribed for California.

¹ Laws 1855, c. 75; and see Laws 1867, c. 28.

² VERMONT.—Acknowledgments in the state may be taken by a justice of the peace, notary public under his official seal, or master in chancery. Out of the state, whether in the United States or a foreign country, they may be taken by a justice of the peace, notary public, or commissioner for Vermont, or any officer authorized by the laws of another state to take acknowledgments; or in a foreign country, also, before any minister, *chargé d'affaires*, consul, or vice-consul. The signature of the officer taking the acknowledgment is *prima facie* sufficient, without the certificate of a clerk of court of record to that effect. No separate acknowledgment or private

examination of the wife is required. See Gen. Stat. 1870, p. 448.

Form of certificate:—

State of _____, County of _____, ss. At this day of _____, 187____, personally appeared _____ and _____ his wife, the signers and sealers of the above written instrument, and acknowledged the same to be their free act and deed.

(Signature and title.)

³ Gen. Stat. 1870, pp. 448, 451.

⁴ VIRGINIA.—Acknowledgments may be made before the clerk of any county or corporation in which the real estate lies, or before a justice, a commissioner in chancery, or notary public, within the United States, or before a commissioner appointed by the governor of this state, or before the clerk of any court out of the state and within the United States; and in any foreign country, before any diplomatic officer, consul-general, consul, vice-consul, or commercial agent appointed by the government of the United States to such foreign country, or before the proper officer of any court of such country, or of the mayor or other chief magistrate of any city, town, or corporation therein. Code, 1873, c. 117, § 2-7.

A married woman must acknowledge upon an examination privily and apart from her husband. The acknowledgment may be made before any of the officers

without notice, until and except from the time that they are duly admitted to record in the county or corporation wherein the property may be : or, when the property is within the jurisdiction of a corporation or hustings court, are recorded in the clerk's office of such court. Deeds other than mortgages and deeds of trust, when recorded within sixty days from the day of acknowledgment, are as valid as to creditors and subsequent purchasers as if recorded on the day of such acknowledgment. When two or more deeds are recorded on the same day, that which is first admitted to record has priority.¹

523. Washington Territory.²— Deeds and mortgages are recorded in the office of the auditor of the county where the land is situated, and are valid as against *bonâ fide* purchasers from the

above named, only that two justices of the peace must act together instead of one. Code, c. 117, § 4.

The form of certificate is as follows. Code, 1873, c. 117, §§ 2, 4 :—

State of _____, County of _____, ss. I (name and title), do certify that _____, whose name is signed to the writing above, bearing date on the _____ day of _____, 18____, has acknowledged the same before me, in my county, aforesaid; and that _____, the wife of _____, whose name is signed to the writing above, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she the said _____ acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this _____ day of _____, 18____.

(Signature and title.)

¹ Code, 1873, c. 114, §§ 4-9.

² WASHINGTON TERRITORY. — Acknowledgments may be taken by a judge of the supreme court, judge of the probate court, justice of the peace, county auditor, a clerk of the district or supreme court, the register of the United States Land Office, or a notary public. Probate Practice Act, 1873, § 2.

Dower and curtesy are now abolished. Stat. 1875, p. 55. To release dower, or convey her real estate, the acknowledgment of a married woman must be separate and apart from her husband.

Certificate of acknowledgment :—

State of _____, County of _____, ss. Be it remembered that on this _____ day of _____, A. D. 187____, before me, the undersigned authority, personally came _____ and _____ his wife, who are personally known to me to be the same persons who are named within, and who executed the foregoing mortgage deed, and severally acknowledged to me that they executed the same freely for the uses and purposes therein set forth. And I certify that I did examine the said _____ separate and apart from her husband, and that I did, in the said examination, make known to her the contents of the said mortgage deed, and fully apprise her of her rights of homestead under the laws of this territory, and of the effect of signing the said mortgage, and she thereupon, then and there, acknowledged to me that she executed the same voluntarily of her own free will, and without any fear of or coercion from her husband.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year first above written.

(Seal.)

(Signature and title.)

date of the filing of them for record. The record is notice to all the world.¹

524. West Virginia.² — Deeds of trust and mortgages are void as to creditors, and subsequent purchasers for a valuable consideration without notice, until and except from the time they are duly admitted to record in the county wherein the property is situated. If two or more writings embracing the same property are admitted to record in same county on the same day, that which was first admitted to record has priority.³

525. Wisconsin.⁴ — Every conveyance not recorded in the

¹ Laws 1859, p. 299.

² WEST VIRGINIA. — Acknowledgments may be made before a justice, notary public, clerk of a county court, prothonotary, or clerk of any court within the United States, or a commissioner appointed by the governor of this state. Out of the United States the certificate must be under the official seal of a minister plenipotentiary, *chargé d'affaires*, consul-general, consul, vice-consul, or commercial agent appointed by the United States to such country, or of the proper officer of any court of such country, or of the mayor or other chief magistrate of any city, town, or corporation therein. Acts 1875, c. 67, § 3.

The wife must acknowledge separate and apart from the husband.

For form of certificate see Acts 1875, §§ 3, 4: —

State of _____, County of _____, to wit: I (name and title), do certify _____, whose name is signed to the writing above (or hereto annexed), bearing date on the day of _____, has this day acknowledged the same before me, in my said _____. Given under my hand this _____ day of _____.

The certificate of wife's acknowledgment should be added as follows: —

And I do certify that _____, wife of _____, whose name is signed to the writing above; bearing date on the _____ day of _____, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband,

and having the said writing fully explained to her, she, the said _____, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it. Given, &c.

³ Code, 1870, c. 74, §§ 5, 8.

⁴ WISCONSIN. — Acknowledgments within the state are made before any judge or commissioner of a court of record, clerk of a circuit court, county clerk, notary public, or justice of the peace; elsewhere in the United States, before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer there authorized by law to take the acknowledgment of deeds therein, or before a commissioner appointed by the governor of this state for such purpose. When the acknowledgment is not before such commissioner, or a notary public under his seal of office, there must be attached a certificate of a clerk of a court of record of the county or district where the acknowledgment was taken, under the seal of his office, of the official character of the officer taking the acknowledgment, of the genuineness of his signature, and that the deed is executed and acknowledged according to the laws of the state, territory, or district. In a foreign country a deed may be executed and acknowledged before a notary public who must certify under his official seal, or other officer authorized by law therein to take such acknowledgments, or any minister, *chargé d'affaires*,

office of the register of deeds for the county in which the land lies is void as against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance shall first be duly recorded.¹ When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall also have been duly recorded.²

526. Wyoming Territory.³—Mortgages and other conveyances are recorded in the office of the register of deeds of the county where the land lies within three months of the date of the instrument. The instrument when recorded is notice to, and takes precedence of, any subsequent purchaser or purchasers, from the time of delivering the instrument at the office of the register of deeds for record.⁴

When a deed purports to be an absolute conveyance in terms,

commissioner, or consul of the United States appointed to reside therein. Rev. Stat. 1871, pp. 1143, 1144.

A married woman may bar her dower, or convey her separate estate, by joining in the deed with her husband. No separate examination is necessary in taking her acknowledgment. Rev. Stat. 1871, p. 1145.

Form of certificate : —

State of _____, County of _____, ss. On this _____ day of _____, A. D. 18____, before me (name and title), personally came _____ and

his wife, to me personally known to be the persons who signed the foregoing deed, and severally acknowledged the execution of the same to be their free act and deed for the uses and purposes therein described.

(Seal.) (Signature and title.)

¹ Rev. Stat. 1871, p. 1147.

² *Ib.* p. 1149.

³ WYOMING TERRITORY. — Acknowledgments within the territory are made before any judge or commissioner of a court of record, a notary public, or justice of the peace. When deeds and mortgages are

executed in any other state, territory, or district of the United States, they may be executed and acknowledged according to the laws of such state, territory, or district, before any officer authorized by its laws to take acknowledgments therein, or before any commissioner appointed by the governor of this territory for that purpose. When the acknowledgment is not made before such commissioner, a certificate must be attached of the clerk of a court of record of the county or district where the acknowledgment is taken, under the seal of his office, of the official character of the officer who took the acknowledgment, of the genuineness of his signature, and that the execution is according to the laws of such state, territory, or district. Compiled Laws, 1876, c. 3, §§ 8-10.

Dower and curtesy are abolished. In a conveyance of the wife's separate estate the husband must join, but the wife executes and acknowledges the deed as if she were sole. *Ib.* c. 3, §§ 2, 11 ; c. 42, § 1.

The form of certificate given for Wisconsin is sufficient for this territory.

⁴ Compiled Laws, 1876, c. 40.

but is made or intended to be made defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance has been recorded in the office of the register of deeds for the county where the lands lie.¹

3. *Requisites as to Execution and Acknowledgment.*

527. Generally. — The first requisite to the valid record of any instrument is that it shall be executed according to law. If defectively executed it is not generally entitled to be recorded; but even if it is recorded it is not constructive notice, so as to vest in the grantee or mortgagee any interest in the premises as against subsequent purchasers in good faith without notice. As between the parties, as already noticed, equity will give the instrument effect according to the intention of the parties.² If a mortgage defectively executed be afterwards reformed, it will not affect the lien of one who has in the mean time purchased in good faith, and according to some authorities will not affect a lien obtained in the mean time by an attachment, or judgment, or a levy of execution.

528. Description. — The description of the property upon which the mortgage is an incumbrance must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any incumbrance upon it.³ If a subsequent mortgagee or purchaser has notice of a mistake in the description of a prior mortgage, as, for instance, that the lot was described as number "eighteen," when "eight" was the correct number of it, the second mortgagee will take subject to the prior, in the same way that he would had the description been correctly given.⁴

A mortgage described certain lots by a town plat which was not recorded, but a plat was subsequently recorded, upon which the

¹ Ib. c. 3, § 16.

² Van Thorniley v. Peters, 26 Ohio St. 471.

³ See §§ 65, 66. Barrows v. Baughman, 9 Mich. 213; Rodgers v. Kavanaugh,

25 Ill. 583. See, also, Ripley v. Harris, 3 Biss. 199, as to the interest in the land mortgaged.

⁴ Warburton v. Lauman, 2 Greene (Iowa), 420.

same lots were described by different numbers. It was held that the absence from the record of the town plat at the time of recording the mortgage was not enough to put the purchaser upon inquiry, and make him chargeable with these facts; and that therefore he was not affected with constructive notice of the mortgage.¹

529. Apparent error in description. — When a description in a mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the mortgage upon the lot intended to be described.² And so the record of a deed, describing the premises by an impossible sectional number, is sufficient to put a purchaser from the same grantor upon inquiry, and may charge him with notice of the grant actually made or intended to be made.³

But although a mistake in description be such that the mortgage lien would be invalidated as against a subsequent purchaser, yet it has been held that a subsequent judgment lien will not for this reason become a paramount lien upon the land intended to be described.⁴ Even where a parcel of land which the parties intended to include in the mortgage was wholly omitted in the description, the deed may be reformed in chancery, and the omitted tract included in the mortgage free from any judgment lien which has in the mean time attached to the debtor's real estate.⁵

530. Signing. — The record of a mortgage without the signature of the mortgagor is not constructive notice, though the mortgage was in fact signed, but the signature was omitted by mistake from the record.⁶

531. Requirement of seal.⁷ — A mortgage, like other convey-

¹ *Stewart v. Huff*, 19 Iowa, 557.

² *Anderson v. Baughman*, 7 Mich. 69; *Tonsley v. Tonsley*, 5 Ohio St. 78.

³ *Merrick v. Wallace*, 19 Ill. 486, 498.

⁴ *Welton v. Tizzard*, 15 Iowa, 495; *Swarts v. Stees*, 2 Kans. 236; *Gillespie v. Moon*, 2 Johns. (N. Y.) Ch. 584, per Kent, Chancellor; *White v. Wilson*, 6 Blackf. (Ind.) 448.

⁵ *White v. Wilson*, *supra*.

⁶ See § 81. *Shepherd v. Burkhalter*, 13 Ga. 443.

⁷ The following is a summary of the laws of the several states in relation to seals: —

ALABAMA: Seal not necessary. If the instrument purports to be under seal, it is the same in effect as if a seal were affixed. Code, 1867, § 1585.

ARKANSAS: Seals not required.

CALIFORNIA: All distinction between sealed and unsealed instruments is abolished. Civil Code, 1872, § 1629.

ances, must generally be executed under seal to entitle it to be recorded.¹ In several states the use of a seal has been wholly dispensed with by statute. In others a scroll is given the same effect as a seal. But where the use of a seal or of its equivalent is required, an instrument purporting to be a mortgage, but not executed under seal, is not entitled to be recorded; and if it be copied into the records, it does not impart notice to subsequent

COLORADO: A scroll answers the place of a seal.

CONNECTICUT: A seal is necessary; but the word "seal" or the letters [L. s.] are equivalent. Gen. Stat. 1875, p. 438.

DAKOTA TERRITORY: A seal or scroll.

DELAWARE: A scroll answers for a seal.

FLORIDA: A scrawl inclosing the word "seal" is effectual as such. 2 Fla. 421.

GEORGIA: A seal includes impressions on the paper itself, or on wax or wafers; a scrawl also answers for a seal. Code, 1873, § 5.

ILLINOIS: A seal is required, but a scroll is sufficient.

IDAHO TERRITORY: Seal required.

INDIANA: A seal or scrawl not requisite.

IOWA: Seal not required.

KANSAS: Neither a seal or a scroll is necessary. Dassler's Stat. 1876, § 637.

KENTUCKY: Neither a seal nor a scroll is necessary. Gen. Stat. 1873, p. 249.

LOUISIANA: No seal or scroll is required.

MAINE: A seal is requisite.

MARYLAND: A scroll answers the place of a seal.

MASSACHUSETTS: A seal is requisite.

MICHIGAN: A scroll answers for a seal, but a deed is not invalid for want of a seal or scroll.

MINNESOTA: A seal is necessary, but a scroll has same effect. Rev. 1866, p. 332.

MISSISSIPPI: A scroll answers for a seal.

MISSOURI: A scrawl may be used instead of a seal.

MONTANA TERRITORY: No seal or scroll required. Laws 1876, p. 126.

NEBRASKA: No seal or scroll necessary. Gen. Stat. 1873, p. 1001.

NEVADA: A scroll answers for a seal.

NEW HAMPSHIRE: A seal is required. Scroll not sufficient.

NEW JERSEY: A seal required; a scroll is sufficient.

NEW MEXICO: A scroll may be used instead of a seal.

NEW YORK: A seal is requisite. A scroll will not do.

NORTH CAROLINA: A scroll answers for a seal.

OHIO: A seal may be either of wax, wafer, or a scrawl.

OREGON: A scroll answers for a seal.

PENNSYLVANIA: An ink scroll is a good seal.

RHODE ISLAND: Seal required. Scroll not sufficient.

SOUTH CAROLINA: A scroll answers for a seal.

TENNESSEE: Seals abolished.

TEXAS: No seal necessary. Paschal's Dig. art. 5087.

VERMONT: A seal is requisite.

UTAH TERRITORY: A scroll may be used for a seal.

VIRGINIA: A scroll operates as a seal.

WEST VIRGINIA: A scroll operates as a seal.

WISCONSIN: A scroll answers as a seal.

WASHINGTON TERRITORY: A seal is required.

WYOMING TERRITORY: A scroll is a sufficient seal. Compiled Laws, 1876, c. 3, § 22.

¹ See § 81. *Hebron v. Centre Harbor*, 11 N. H. 571; *Bowers v. Oyster*, 3 Pa. 239; *In re St. Helen Mill Co.* 3 Sawyer, 88. And see *Woods v. Wallace*, 22 Pa. St. 171; *Hughes v. Tong*, 1 Mo. 389; *Moore v. Madden*, 7 Ark. 530.

purchasers or incumbrancers.¹ Such an instrument, however, will operate as an equitable mortgage, and will prevail against a subsequent agreement to give a mortgage.²

532. Requirement of witnesses.³—The record of a mortgage

¹ *Raconillat v. Sansevain*, 32 Cal. 376.

² *Portwood v. Outton*, 3 B. Mon. (Ky.) 247.

³ The following is a summary of the statutory requirements of the several states in respect to witnesses:—

ALABAMA: If acknowledged, no witness necessary; but to release dower and to prove without acknowledgment, two witnesses must attest. Code, 1867, p. 363.

ARKANSAS: Two witnesses required. Dig. of Stat. 1858, p. 265.

CALIFORNIA: No witness is necessary.

COLORADO: No witness required.

CONNECTICUT: To be attested by two witnesses.

DAKOTA TERRITORY: No witness necessary.

DELAWARE: One witness necessary.

FLORIDA: Two witnesses required. Bush's Dig. 148; Laws 1873, p. 18.

IDAHO TERRITORY: Witness necessary only to prove without acknowledgment.

GEORGIA: Two witnesses, of whom one should be the officer who takes the acknowledgment.

ILLINOIS: No witness required.

INDIANA: No witness required.

IOWA: No witness required.

KANSAS: No witness required, except to make proof of deed.

KENTUCKY: Two witnesses required to prove a deed not acknowledged.

LOUISIANA: Two witnesses are required.

MAINE: No witness necessary, but one is usual.

MASSACHUSETTS: No witness necessary, but one is usual.

MARYLAND: To be attested by at least one witness. Code, 1860, art. 24, § 10.

MICHIGAN: To be executed in presence of two witnesses. Compiled Laws, p. 1342.

MINNESOTA: To be attested by two witnesses. Laws 1867, p. 59.

MISSISSIPPI: One or more subscribing witnesses. Code, 1871, p. 503.

MISSOURI: No witness required.

MONTANA TERRITORY: Witness only necessary to make proof without acknowledgment.

NEVADA: No witness required. When signature is by mark, one is necessary.

NEBRASKA: One witness required.

NEW HAMPSHIRE: Two or more witnesses required. Gen. Stat. 1867, p. 251.

NEW JERSEY: One witness necessary.

NEW YORK: One witness necessary.

NORTH CAROLINA: Witness not required when acknowledged, but one or more to prove without.

OHIO: Two witnesses are requisite.

OREGON: Two witnesses required for a deed made within the state.

PENNSYLVANIA: One or more witnesses usual, but not necessary, unless grantor signs by mark.

RHODE ISLAND: No witness necessary.

SOUTH CAROLINA: Two witnesses required. Rev. Stat. 1873, p. 423.

TENNESSEE: No witness required when deed is acknowledged.

TEXAS: No witness required when acknowledged. Two to prove.

UTAH TERRITORY: One witness or more.

VERMONT: Two witnesses required.

VIRGINIA: Two witnesses required to prove, but none when acknowledged.

WEST VIRGINIA: No witness required when acknowledged. Two to prove without.

WASHINGTON TERRITORY: Two witnesses required.

WISCONSIN: Two witnesses required. Rev. Stat. 1871, p. 1043.

not executed in compliance with a statute requiring that it shall be attested by two witnesses is not constructive notice,¹ though the defect be not apparent on the face of the instrument, one of the witnesses being the grantor's wife.² Upon the same principle the record of a mortgage acknowledged before one justice of the peace, when a statute required it to be made before two justices, does not operate as notice.³ But a mortgage attested by one witness under such a statute is good in equity between the parties,⁴ and as against all others whether purchasers or creditors, who had actual notice of the existence of the mortgage.⁵ When a statute provides that a deed, to be recordable, shall be attested by two witnesses, and a mortgage so witnessed was by mistake recorded without any copy of the attestation, it was held that the registry was not constructive notice. The recording of the instrument not being in compliance with the law, the registration is a mere nullity; and a subsequent purchaser is affected only by such actual notice as would amount to a fraud.⁶

533. Acknowledgment or proof a prerequisite to the record. — The recording acts generally prescribe certain formalities in the execution of a deed which must be complied with to entitle it to be recorded. An acknowledgment or proof of the deed before some officer is an essential prerequisite. Without an acknowledgment, or with one that is defective, the record of the deed is unauthorized and is not constructive notice.⁷ The purpose of this requirement is to insure the authenticity of the instrument before

WYOMING TERRITORY: Two witnesses required. Compiled Laws, 1876, ch. 3, § 8.

¹ See § 82; Thompson v. Morgan, 6 Minn. 292; Harper v. Barsh, 10 Rich. (S. C.), Eq. 149; New York Life Ins. & Trust Co. v. Staats, 21 Barb. 570; Van Thorniley v. Peters, 26 Ohio St. 471; Gardner v. Moore, 51 Ga. 268; Ross v. Worthington, 11 Minn. 438; White v. Denman, 16 Ohio, 59; 1 Ohio St. 110; Hodgson v. Butts, 3 Cranch, 140.

² Carter v. Champion, 8 Conn. 549.

³ Dufphey v. Frenaye, 5 St. & P. (Ala.) 215; and see Munn v. Lewis, 2 Port. (Ala.) 24.

⁴ Moore v. Thomas, 1 Oregon, 201; Hastings v. Cutler, 24 N. H. 481.

⁵ Sanborn v. Robinson, 54 N. H. 239; Hastings v. Cutler, *supra*.

⁶ Pringle v. Dunn, 37 Wis. 449.

⁷ See § 83; Blood v. Blood, 23 Pick. (Mass.) 472; Wood v. Cockrane, 39 Vt. 544; Frost v. Beekman, 1 Johns. (N. Y.) Ch. 288; Work v. Harper, 24 Miss. 517; Dufphey v. Frenaye, 5 St. & P. (Ala.) 215; Parret v. Shaubhut, 5 Minn. 323; Jacoway v. Gault, 20 Ark. 190; White v. Denman, 1 Ohio St. 110; Bishop v. Schneider, 46 Mo. 472; Jones v. Berkshire, 15 Iowa, 248; and see White & Tudor's Lead. Cas. in Eq. 4th Am. ed. vol. 2d, pt. 6, p. 206.

admitting it of record. The certificate must be made and attested substantially in the form given by statute, or where no special form is prescribed, then in accordance substantially with the provisions of the statute respecting it; but it need not be in the exact words of the form or of the statute.¹ When a statute requires the acknowledgment of a married woman to be taken separate and apart from her husband, the record is no notice of a lien on her estate unless the acknowledgment is so taken.²

If the acknowledgment be by an agent, the certificate should show with reasonable clearness that the acknowledgment was made on the behalf of the constituent or as being his deed.³ A mortgage recorded without having been acknowledged creates no valid lien as against creditors and subsequent purchasers, whether they have actual notice of the mortgage or not; but it is good as between the parties, and on breach of the condition of payment may be enforced against the mortgagor, and on his death, against his administrator in preference to his general creditors.⁴

534. The officer must be duly appointed and qualified. — The registration of a mortgage, acknowledged or proved before an officer who has not been duly appointed or qualified, has no effect in rendering it operative against subsequent purchasers.⁵ It is equally necessary that the officer should act within the limits of his jurisdiction.⁶ A judge, or commissioner, or other officer empowered to take an acknowledgment, cannot act out of the state for which he was appointed.⁷

When, however, acknowledgments made before an officer not authorized to act are by statute declared to be good and effectual, in the same way that they would have been had they been taken and certified by an officer properly qualified, one purchasing after

¹ *Alvis v. Morrison*, 63 Ill. 181; *Meriam v. Harsen*, 2 Barb. (N. Y.) Ch. 232; *Daval v. Covenhoven*, 4 Wend. (N. Y.) 561.

² *Armstrong v. Ross*, 20 N. J. Eq. 109.

³ *McDaniels v. Flower Brook M. Co.* 22 Vt. 274.

⁴ *Haskill v. Sevier*, 25 Ark. 152; *Main v. Alexander*, 9 Ark. 112.

⁵ *Gudderette v. Smyth*, 13 Ired. (N. C.) L. 452.

⁶ *Jackson v. Colden*, 4 Cow. (N. Y.) 266.

⁷ *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498. A certificate of acknowledgment in which the officer describes himself as "a justice of the peace within and for said county," no county being named, except that in the body of the deed, where both the grantor and grantee resided, is not necessarily invalid. *Beckel v. Petticrew*, 6 Ohio St. 247; *Fahrman v. Loudon*, 13 S. & R. (Pa.) 386.

such statute has gone into effect is bound to take notice of the conveyance, though until that time the record would be notice to no one.¹

535. Taking an acknowledgment is a ministerial act; therefore it may be done by one who is so related to the parties as to be disqualified as a judge or juror.² It has been held that a married woman may acknowledge a mortgage of her separate estate before her husband, he being a justice of the peace.³

536. Requirement of certificate of official character of officer. — In like manner, when a statute requires that the certificate of acknowledgment shall be accompanied by a certificate of the official character of the officer before whom the acknowledgment was made, the filing of the mortgage for record without the latter certificate does not constitute a record of it. If, however, this certificate is subsequently obtained and recorded in the registry where the deed is recorded, the mortgage will be treated as recorded from the date of the filing of this certificate.⁴

537. Requirement that officer shall certify that he is personally acquainted with grantor. — Upon the same principle also, when a statute requires that the officer shall certify that he is personally acquainted with the party making the acknowledgment, the omission so to do renders null the acknowledgment and the record.⁵ The requirement must be substantially complied with.⁶ If the officer taking the acknowledgment certifies that he knows the parties by whom the instrument purports to be executed, when in fact he did not, his certificate, though *primâ facie* valid, upon proof of this fact is a nullity, both as entitling the paper to be recorded and as affording any proof of its execution, though in fact the instrument was acknowledged by the persons who exe-

¹ *Journey v. Gibson*, 56 Pa. St. 57.

² *Lynch v. Livingston*, 6 N. Y. 422.

³ *Kimball v. Johnson*, 14 Wis. 674.

⁴ *Reasoner v. Edmundson*, 5 Ind. 393; *Ely v. Wilcox*, 20 Wis. 523.

⁵ *Kelsey v. Dunlap*, 7 Cal. 160; *Peyton v. Peacock*, 1 Humph. (Tenn.) 135. In this case, although the improper registration was not insisted upon by the answer,

the court upon the exhibition of the deed took notice of the defect. See, also, *Johnson v. Walton*, 1 Sneed (Tenn.), 258; *Bone v. Greenlee*, 1 Cold. (Tenn.) 29; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Livingston v. Ketelle*, 6 Ill. 116.

⁶ *Ritter v. Worth*, 58 N. Y. 627; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Troup v. Haight*, Hopk. (N. Y.) 239.

cuted it.¹ As between the parties themselves the mortgage would, of course, be valid upon proof of its execution and delivery.

A certificate of acknowledgment which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it, as prescribed by the statute, is insufficient to entitle the deed to be recorded²

538. The certificate of acknowledgment not conclusive. —

A certificate of acknowledgment which is correct in form, and is apparently executed by one authorized to act in the matter, and within his jurisdiction, is sufficient to admit the deed to record, and is *primâ facie* good; but it is not conclusive.³ It may be shown that the officer who made the certificate was not in fact authorized to act, or had become incompetent, or that he acted outside his jurisdiction.⁴ It may be shown that the deed was never in fact executed or delivered.⁵ The presumption of regularity must, however, be first overcome. The officer is *primâ facie* such as he is described to be, *de facto* and *de jure*. He is like an officer authorized to take testimony under a special commission. His return must stand until it is impeached by collateral proof. Until this is done his return is proof in itself of his official character, of his signature, and of his acting within his jurisdiction.⁶

A mistake in the certificate of acknowledgment, whereby the grantee instead of the grantor appeared to be the person who made the acknowledgment, cannot be corrected in a court of equity, so as to give the record of the deed legal effect from the beginning, because it cannot be determined from the face of the instrument whether the error consisted in inserting the wrong name, or in taking the acknowledgment of the wrong man.⁷ A

¹ *Watson v. Campbell*, 28 Barb. (N. Y.) 421. "This case," says Mr. Justice Ingraham, "shows the impropriety of a commissioner of deeds, in such an acknowledgment, certifying that he knows the parties, without any other knowledge than a mere introduction, or seeing the signature written. He thereby endangers the security, and exposes himself to liability for damages arising therefrom."

² *Fryer v. Rockefeller*, 63 N. Y. 268.

³ *Hardenbergh v. Schoonmaker*, 4 Johns. (N. Y.) 161; *Morris v. Keyes*, 1 Hill (N. Y.), 540; *People v. Snyder*, 41 N. Y. 397.

⁴ *Lynch v. Livingston*, 6 N. Y. 422.

⁵ *Jackson v. Perkins*, 2 Wend. (N. Y.) 308.

⁶ *Thurman v. Cameron*, 24 Wend. (N. Y.) 87, and cases cited.

⁷ *Wood v. Cochrane*, 39 Vt. 544.

mistake in the date of an acknowledgment may be shown and the true date established.¹

As to the statements of fact contained in a certificate of acknowledgment which is regular in form, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received. If, for instance, the certificate shows that a married woman was examined separate and apart from her husband, and voluntarily relinquished her rights of dower and homestead in the lands, it cannot be impeached by evidence that there was no private examination; that she did not acknowledge the deed as her act and deed; that the contents of the deed were not made known to her; or that she did not release her homestead right. There must first be some allegation and proof of fraud or imposition practised upon her; or some fraudulent combination between the parties interested and the officer taking the acknowledgment.² There would be no certainty in titles if the officer's certificate could be contradicted by any other evidence. The law directs him to make his certificate in writing, and when he has made it the world is to look to that and to nothing else.³ Parol evidence can only be admitted to show fraud or duress connected with the acknowledgment; not to contradict the officer's certificate.⁴

The exception, that the magistrate's certificate is not conclusive of the facts stated in it when fraud is shown, does not, however, extend to the case of one who has in good faith purchased without notice of the fraud; he is protected by the record notwithstanding the fraud.⁵ If he has actual knowledge of fraud or duress in obtaining a wife's acknowledgment to a deed, or knowledge of such circumstances as would naturally lead him to inquiry, he is deprived of the protection accorded to an innocent and *bonâ fide* holder. Even less than actual duress will avoid a wife's acknowledgment of a mortgage in the hands of an assignee who ought to have inquired for defences and did not. It is enough if it be

¹ *Hoit v. Russell*, 56 N. H. 559.

³ Per Tilghman, C. J., in *Jourdan v.*

² *Heeter v. Glasgow*, 79 Pa. St. 79; *Jourdan*, 9 Serg. & R. (Pa.) 268; and *Graham v. Anderson*, 42 Ill. 514; *Monroe v. Poorman*, 62 Ill. 523; *Jamison v. Jamison*, 3 Whart. (Pa.) 457; *Ridgely v. Howard*, 3 Harris & McHenry (Md.), 321; *Hartley v. Frosh*, 6 Texas, 208; *M'Neely v. Rucker*, 6 Blackf. (Ind.) 391.

⁴ *Heeter v. Glasgow*, 79 Pa. St. 79.

⁵ *Heeter v. Glasgow*, 79 Pa. St. 79; *Hall v. Patterson*, 51 Pa. St. 289.

shown that she did it under moral constraint, as for instance by threats, persecution, and harshness on the part of her husband. These facts being known to the mortgagee his assignee is affected by them, in case he is not entitled to the protection accorded to one who takes negotiable paper for value before maturity. He should inquire of the mortgagors whether the mortgage is open to any defence.¹

539. Delivery is another incident necessary to giving effect to the mortgage even as between the parties to it.² Although the deed be recorded, if it has not been delivered, a subsequent conveyance by the mortgagor, or a subsequent judgment against him, will take precedence.³

The fact of the acknowledgment of the deed at a certain date is not by itself evidence that the mortgage was delivered at that time, or was ever delivered,⁴ though this has been said to be presumptive evidence.⁵ The record of the mortgage is said to be evidence of delivery in a greater degree, but it is not conclusive of a delivery. It has sometimes been spoken of as *primâ facie* evidence of delivery.⁶ It may be evidence for the jury to consider.⁷

But registration itself does not operate as a delivery; nor does it supersede the necessity of proof of a delivery.⁸ A delivery of the mortgage to the register for record may be an effectual delivery to the mortgagee, where such delivery is made at the request of the mortgagee,⁹ or the register had authority from him to receive it and keep it.

Of course, a delivery to an agent of the mortgagee is a delivery to the mortgagee himself; as for instance a delivery to the secretary of a railroad company is sufficient.¹⁰

¹ McCandless v. Engle, 51 Pa. St. 309; Michenor v. Cavender, 38 Ib. 337; Twitchell v. McMurtrie, 77 Ib. 383.

² Hoadley v. Hadley, 48 Ind. 452; Freeman v. Peay, 23 Ark. 439; Maynard v. Maynard, 10 Mass. 456.

³ Woodbury v. Fisher, 20 Ind. 387; Goodsell v. Stinson, 7 Blackf. (Ind.) 437.

⁴ Freeman v. Schroeder, 43 Barb. (N. Y.) 618; 29 How. Pr. 263; Jackson v. Richards, 6 Cow. (N. Y.) 617.

⁵ Wyckoff v. Remsen, 11 Paige (N. Y.), 564.

⁶ Kille v. Ege, 79 Pa. St. 15; Jackson v. Perkins, 2 Wend. (N. Y.) 308.

⁷ Jordan v. Farnsworth, 15 Gray (Mass.), 517.

⁸ Hawkes v. Pike, 105 Mass. 560; Parker v. Hill, 8 Met. (Mass.) 447; Foley v. Howard, 8 Iowa, 56.

⁹ Dusenbury v. Hulbert, 2 Thomp. & C. (N. Y.) 177; Thayer v. Stark, 6 Cush. (Mass.) 11, 14.

¹⁰ Patterson v. Ball, 19 Wis. 243; Truman v. McCollum, 20 Ib. 360.

540. **Delivery after recording.** — Although a mortgage is of no effect until there has been a delivery of it to the mortgagee, yet if it is made for a good consideration, as for instance an existing debt, and is filed for record without delivery, a subsequent acceptance of the deed by the mortgagee has been held to ratify the making and recording of it, and to give it legal effect from the time of filing, as against intermediate incumbrances.¹ When, for instance, one in debt to a bank executed a mortgage to it, and without delivering it sent it to the record office to be recorded, and then sent word to the officers of the bank of the execution of the mortgage, and that they could get it of the recorder, and they replied that “they were glad it was done,” this was held a sufficient delivery of the deed to the bank to pass the title as against one to whom the mortgagor made and delivered another mortgage of the same property two days afterwards, but after such notification to the bank and reply.²

A delivery may be made to a stranger in behalf of the mortgagee, and without his authority, and upon his subsequent acceptance of the mortgage, the title is regarded as having vested in him from the time of such delivery. Such was held to be the case where one in failing circumstances made a mortgage to a creditor who resided out of the state, without the knowledge of his creditor, and delivered it to his own attorney for the benefit of the creditor, with the request that the attorney should cause it to be recorded and handed to the creditor. The mortgage was accordingly recorded, and afterwards received and accepted by the mortgagee; but after the delivery of it to the attorney and the recording of it, but before the attorney had delivered it to the mortgagee, the property was attached by another creditor of the mortgagor's. It was held that the mortgaged estate immediately vested in the mortgagee, whose title was therefore superior to that of the attaching creditor.³

It has been held, moreover, that it may be presumed that a mortgagee, in whose favor a mortgage has been executed and placed on record, will assent to it on being notified of its existence; and therefore, although it be made and recorded without his knowledge, and the land is afterwards attached by creditors of the mortgagor before the mortgagee has notice of the mortgage,

¹ *Carnall v. Duval*, 22 Ark. 136.

³ *Merrills v. Swift*, 18 Conn. 257, and

² *Farmers', &c. Bank v. Drury*, 38 Vt. 426. cases cited.

which he afterwards assents to and ratifies, he may hold the mortgage lien against such attachments.¹

541. When a subsequent delivery becomes operative.— Although a deed be inoperative at the time it is recorded, as when it is recorded before delivery, or is recorded as a deed when intended as a mortgage, and the statutes of the state where it is executed require that it shall be recorded in such case in separate mortgage books, upon a subsequent delivery in the one case, and in the other upon a purchase of the equity of redemption by the mortgagee, the record then becomes fully operative.² The delivery of the deed, or the purchase of the equity of redemption, is equivalent to a delivery of the deed for record at that time, in the same way as when a deed is recorded in anticipation of the completion of a sale. The mortgage is effectual only from the time of such delivery, and any one who has in the mean time before the delivery obtained a lien upon the property has a preference over such mortgagee. His assent to the mortgage makes the mortgage valid, and the record of it notice only from that time.³ Where, for instance, a mortgage was recorded on the 13th day of May, 1870, and was held by the mortgagor ready for delivery when he should obtain a loan, and was not delivered until the 7th day of the following month, the latter date was held to be the date of its registry, as against one who in the mean time had acquired a mechanic's lien upon the property.

But if the mortgage be executed and acknowledged, and put upon record by the mortgagor, in pursuance of a prior contract for a loan upon it, which is afterwards made in pursuance of the contract, and the mortgage is then delivered upon the payment of the money, it has priority in equity over liens of mechanics and material men, for work and materials furnished after the mortgage is recorded for a building which the mortgagor commenced to erect upon the premises after the recording of the mortgage and before its delivery, the mortgagee having no knowledge of this fact. In such case the mortgage upon delivery has relation to the agreement for the loan, and the registry takes effect

¹ *Ensworth v. King*, 50 Mo. 477.

Barb. (N. Y.) 505; *Jackson v. Richards*,

² See §§ 85-87; *Warner v. Winslow*, 1 Sandf. (N. Y.) Ch. 430.

6 Cow. (N. Y.) 617; *Hood v. Brown*, 2 Ohio, 266; *Mut. Benefit Life Ins. Co. v.*

³ *Foster v. Beardsley Scythe Co.* 47

Rowand, 26 N. J. Eq. 389.

and becomes operative as constructive notice before the delivery, and from the time the mortgage was left for record.¹

4. *Requisites as to the Time and Manner of Recording.*

542. The record is notice from the time of filing the deed for record. — It is sometimes provided by statute that a mortgage or other deed shall be deemed to be recorded when it is filed for record, or noted in an entry book by the recorder as received. But aside from any statutory provision, the judicial interpretation of the effect of the filing is the same.² The mortgage record dates from the moment it is left for record, and is indorsed by the recorder and entered upon the index or entry book, although it is not actually spread upon the record for months, or any length of time afterwards.³ It may be kept in the office and referred to until it is transcribed. When it is spread upon the record, however, it is notice of only what appears upon the record. Errors in transcribing affect the holder of the title, and not one who purchases in good faith.⁴

If the mortgage be left at the registry in the absence of the recorder, and it is received and filed by a clerk in charge of the office, the filing is sufficient, though the clerk has no authority to perform the duties of the register. It is the duty of the recording officer to enter and number the mortgage, and the rights of the mortgagee cannot be impaired by his omission to do so.⁵

543. As to the time when a mortgage deed was left for record, the certificate of the register is conclusive as between the mortgagee and a creditor who has attached the mortgaged land subsequently to the time stated in the certificate.⁶ The certificate

¹ *Jacobus v. Mutual Benefit Life Ins. Co.* 27 N. J. Eq. 604. The doctrine of relation is fully considered in this case. See, also, *Pratt v. Potter*, 21 Barb. (N. Y.) 589; *Judd v. Scekins*, 62 N. Y. 266; *S. C. 3 T. & C.* 266.

² *Brooke's Appeal*, 64 Pa. St. 127; *Kessler v. State*, 24 Ind. 313; *Magee v. Beatty*, 8 Ohio, 396; *Brown v. Kirkman*, 1 Ohio St. 116; *Fosdick v. Barr*, 3 Ib. 471; *Bloom v. Noggle*, 4 Ib. 45; *Tousley v. Tousley*, 5 Ib. 78; *Bercaw v. Cock-erill*, 20 Ib. 163.

³ *Wood's Appeal*, 82 Pa. St. 116; *Kiser v. Henston*, 38 Ill. 252; *Franklin v. Cannon*, 1 Root (Conn.), 500; *Throckmorton v. Price*, 28 Tex. 605; *Brooke's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 W. & S. (Pa.) 314.

⁴ *Terrell v. Andrew County*, 44 Mo. 309; *Bishop v. Schneider*, 46 Mo. 472.

⁵ *Dodge v. Potter*, 18 Barb. (N. Y.) 193.

⁶ *Tracy v. Jenks*, 15 Pick. (Mass.) 465; *Adams v. Pratt*, 109 Mass. 59; *Fuller v. Cunningham*, 105 Mass. 442; *Ames v. Phelps*, 18 Pick. (Mass.) 314.

is not, however, conclusive of anything beyond the time of the receipt of the instrument for record, as for instance it is not conclusive that it is duly recorded.¹

When the time of receiving a mortgage for record as entered in the index book shows upon its face that it was not made at the time of such reception, the presumption of the correctness of the register's entry is lost.²

As between two mortgagees, whose mortgages are executed and recorded on the same day, parol evidence is admissible to show which was first deposited for record.³ To ascertain which is prior the fractional parts of a day are considered.⁴ In case no entry is made upon the record of the time of the recording of the mortgage, when the law of a state required no such entry, and it appears from the record to have been recorded at an early day, it will be presumed that the record was made within the time required by law after the execution of it.⁵

544. Effect of requirement that registry shall be made within a specified time. — It will be observed that the recording acts of some states, as for instance of Georgia, Indiana, Maryland, Pennsylvania, and Wyoming Territory, provide that a mortgage shall be recorded within a specified time after the execution of it. The effect of this provision is not to invalidate the mortgage as between the parties if not recorded within the time specified. It is admissible in evidence, and is an equitable lien, although not so recorded.⁶ The failure to comply with this requirement only goes to the effect of the mortgage as to subsequent purchasers. As to those whose conveyances are registered before it the mortgage is ineffectual.⁷ Of two mortgages of equal equity, recorded within the time limited after execution, that which is first recorded has priority.⁸

¹ *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469; *Thorp v. Merrill*, 21 Minn. 336.

² *Hay v. Hill*, 24 Wis. 235.

³ *Spaulding v. Scanland*, 6 B. Mon. (Ky.) 353.

⁴ *Lemon v. Staats*, 1 Cow. (N. Y.) 592.

⁵ *Hall v. Tunnell*, 1 Houst. (Del.) 320.

⁶ *Sixth Ward Building Ass'n v. Willson*, 41 Md. 506; *Den v. Watkins*, 6 N. J. L. (1 Halst.) 445; *Ashe v. Livingston*,

2 Bay (S. C.), 80; *Penman v. Hart*, *ib.* 251; *Ash v. Ash*, 1 *ib.* 304; *Rootes v. Holliday*, 6 Munf. (Va.) 251; *Plume v. Bone*, 13 N. J. L. (1 Green), 63; *Charter v. Graham*, 56 Ill. 19.

⁷ *Cowan v. Green*, 2 Hawks (N. C.), 384.

⁸ *Dungan v. Am. &c. Ins. Co.* 52 Pa. St. 253; *Den v. Roberts*, 4 N. J. L. (1 South.) 315.

545. A mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it. His general creditors cannot for that reason claim that the mortgage was inoperative as against them.¹ The recording of a deed is no part of its execution. Neither does a lien attach to the real estate of a debtor in favor of his general creditors immediately upon his death, as against the specific lien of the mortgage which was good against the mortgagor. His heirs take the estate upon his decease subject to the incumbrance; and the lien of the general creditors, which is merely a right to have the real estate in the hands of the heirs applied for their benefit upon a deficiency of the personal assets, attaches to it in the same condition.² In like manner a mortgage executed and delivered before a general assignment of the mortgagor, for the benefit of his creditors or before his bankruptcy, if valid in other respects is valid against the assignment or the bankruptcy, though not recorded until afterwards.³

546. When it is provided that mortgages shall be recorded in books kept for that purpose separate from other instruments, a mortgage recorded as a deed is not effectual as against subsequent *bonâ fide* purchasers or mortgagees; even if the mortgage be in form an absolute deed, but intended as security for a loan of money.⁴

If a mortgage is not recorded in the mortgage books, it cannot be found by means of the index to those books, and therefore is not regarded as properly recorded.⁵ Such a deed is of course valid as between the parties,⁶ and though the record is a nullity, it becomes operative in case the mortgagee afterwards acquires the equity of redemption.⁷ A subsequent purchaser or mortgagee, who has actual notice of a mortgage which is improperly

¹ Gill v. Pinney, 12 Ohio St. 38; Haskell v. Bissell, 11 Conn. 174.

² Gill v. Pinney, 12 Ohio St. 38.

³ Mellon's Appeal, 32 Pa. St. 121; Wyckoff v. Remsen, 11 Paige (N. Y.), 564.

⁴ Warner v. Winslow, 1 Sandf. (N. Y.) Ch. 430; Brown v. Dean, 3 Wend. (N. Y.) 208; White v. Moore, 1 Paige (N. Y.), 551; Grimestone v. Carter, 3 Ib. 421; James v. Morey, 2 Cow. (N. Y.) 246; S.

C. 6 Johns. (N. Y.) Ch. 417; Clute v. Robison, 2 Johns. (N. Y.) 595; Dey v. Dunham, 2 Johns. (N. Y.) Ch. 182; Cordeviollé v. Dawson, 26 La. Ann. 534; Calder v. Chapman, 52 Pa. St. 359, 362, and cases cited.

⁵ Luch's Appeal, 44 Pa. St. 519.

⁶ James v. Morey, 6 Johns. (N. Y.) Ch. 417.

⁷ Warner v. Winslow, 1 Sandf. (N. Y.) Ch. 430; Grellet v. Heilshorn, 4 Nev. 526.

recorded as an absolute conveyance, of course takes a title subject to such mortgage just as he would if the mortgage were not recorded at all. A statute which is merely directory to the recorder in this respect would not invalidate a record of the mortgage not made in the record books specially used for mortgages.¹

Of course the mortgage, whether in regular form or by way of an absolute deed, is valid between the parties, although the statute requirement that it be recorded as a mortgage be not complied with.²

547. The effect of a requirement that a power of attorney under which a mortgage is executed shall be recorded with it. — It is sometimes provided by statute that a power of attorney, under which a mortgage or other conveyance is executed, shall be recorded with the deed, which owes its existence to the power, and when this is the case the record of the deed without the power has no legal effect.³

But, aside from this requirement, it is not necessary that a power should be recorded with the mortgage, or that it should be recorded at all, in order that the mortgage deed when recorded should be notice to all the world.⁴

The record of a power of attorney, when the law does not require it to be recorded, does not amount to constructive notice.⁵ The law does not intend that to be known, for the existence of which there is no legal necessity.⁶

548. Record of separate defeasance. — When an absolute deed is given in the way of security, with written defeasance back, the rights of the mortgagee are in general fully protected without any record of the defeasance. The deed is sufficient notice of his interest.⁷ In fact, it is notice of a greater interest than he actually has. But this does not matter except in those states in which the recording of the defeasance is expressly re-

¹ *Smith v. Smith*, 13 Ohio St. 532.

² *James v. Morey*, 2 Cow. (N. Y.) 246;

⁶ *Johns. Ch.* 417.

³ *Carnall v. Duval*, 22 Ark. 136.

⁴ *Wilson v. Troup*, 2 Cow. (N. Y.) 195.

⁵ *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359.

⁶ *James v. Morey*, 2 Cow. (N. Y.) 296.

⁷ *Clemons v. Elder*, 9 Iowa, 272; *Young v. Thompson*, 2 Kas. 83; *Newberry v. Bulkley*, 5 Day (Conn.), 384; but see *Friedley v. Hamilton*, 17 S. & R. (Pa.) 70; *Jaques v. Weeks*, 7 Watts (Pa.), 287.

quired as a condition upon which the mortgagee shall derive any benefit from the record of the deed, as in California, Dakota Territory, Delaware, Maryland, Nebraska, New Jersey, and New York.¹ When the defeasance is not recorded, the obvious effect of the record of the deed alone is to make the grantee the apparent absolute owner of the estate, and the person who holds the defeasance may be barred of all right of redemption by a sale by the mortgagee to one who buys in good faith and without notice of such defeasance. As to third persons, the absolute conveyance is not defeated or affected unless the defeasance is also recorded; and an express declaration to this effect has been made by statute in several states, as in Delaware, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Oregon, Rhode Island, Wisconsin, and Wyoming Territory; and in New Hampshire it is provided that the conveyance shall not be defeated or the estate incumbered, unless the defeasance is contained in the condition of the mortgage. The object of the latter statutes is to protect innocent purchasers from the mortgagee who has apparently an indefeasible title; while the provision whereby the record of the defeasance is enforced, in the states before named, is made for the protection of the mortgagor.

These requirements of statute have no application when the conveyance to which the defeasance relates does not purport upon its face to be absolute and unconditional.² While a purchaser in good faith and without notice, from a mortgagee, by an absolute conveyance obtains a title not subject to redemption, yet if the purchaser has notice of the original transaction, he takes only the mortgagee's title; and if there are successive mutations, but always coupled with such notice, the original conveyance continues as a mortgage.³ The fact that the grantor remains in possession of the property has been held sufficient to charge the purchaser with such notice.⁴

¹ See statutes, *ante*. The same rule is judicially established in PENNSYLVANIA. "A mortgage," says Mr. Justice Black, in *Hendrickson's Appeal*, "when in the shape of an absolute conveyance, with a separate defeasance, the former being recorded the latter not, gives the holder no rights against a subsequent incumbrancer. It is good for nothing as a conveyance, because it is, in fact, not a conveyance; and it is

equally worthless as a mortgage, because it does not appear by the record to be a mortgage."

² *Russell v. Waite*, Walk. (Mich.) 31; *Noyes v. Sturdivant*, 18 Me. 104.

³ *Brown v. Gaffney*, 28 Ill. 149; *Shaver v. Woodward*, Ib. 277; *Hall v. Savill*, 3 Greene (Iowa), 37; *Williams v. Thorn*, 11 Paige (N. Y.), 459.

⁴ *Mann v. Falcon*, 25 Tex. 274.

549. A purchaser may rely upon the legal title as it appears of record. — These provisions of statute are, however, only the enactment of a principle that is necessarily deduced from the general provisions of the registry system, and which had already been established by judicial construction.¹ “It is regarded,” says Chief Justice Redfield, “as more in conformity to just principles of equity and fair dealing, that the estate of the *cestui que trust* should be extinguished by the deed of the trustee, than that the equal equity of the purchaser should be defeated, and thus the free and fair transmission of estates be embarrassed and placed under a cloud of suspicion and doubt. The equities of the parties being equal, the legal estate is allowed to prevail, and a rule of policy is at the same time subserved, by leaving the transmission of titles unembarrassed as far as practicable, thus inspiring confidence, rather than distrust, in the transmission of titles to real estate.”²

• When the mortgage is by a deed absolute in form, and the defeasance is not recorded, the grantee can of course convey a good title to a *bonâ fide* purchaser.³ The position of the parties is quite the same, when the holder of a mortgage duly recorded has taken a conveyance of the equity of redemption, and has then assigned the mortgage to one who does not record the assignment, and has then conveyed the fee to another. Apparently the mortgagee, at the time of his conveyance in fee, had the complete title by merger of the mortgage in the fee, just as the mortgagee by an absolute deed has it; and the prior assignment of the mortgage by an assignment not recorded amounts to the defeasance not being recorded.⁴

As elsewhere noticed, neither an attaching creditor nor a judgment creditor is regarded as a purchaser, and therefore he acquires by his attachment or judgment no lien upon the land in the hands of the mortgagee holding the title absolutely, as against the equi-

¹ See § 339; *Newhall v. Burt*, 7 Pick. (Mass.) 157; *Newhall v. Pierce*, 5 Ib. 450; *Harrison v. Phillips Academy*, 12 Mass. 456; *Mills v. Comstock*, 5 Johns. (N. Y.) Ch. 214; *Whittick v. Kane*, 1 Paige (N. Y.), 202; *Stoddard v. Rotton*, 5 Bosw. (N. Y.) 378; *Columbia Bank v. Jacobs*, 10 Mich. 349.

² *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

³ *Bailey v. Myrick*, 50 Me. 171.

⁴ *Mills v. Comstock*, 5 Johns. Ch. 214. See *Purdy v. Huntington*, 42 N. Y. 334; S. C. 46 Barb. 389, reversed.

table *cestui que trust*, or grantor equitably entitled to the equity of redemption.¹

5. Errors in the Record.

550. If the record of a mortgage be defective for any cause it does not amount to constructive notice.² Every requirement of statute in relation to the execution and acknowledgment or proof of the mortgage must be complied with in order to gain priority by the record of it.³ Moreover, the deed as it stands must be spread upon the record correctly. Persons interested in a title have a right to resort to the records to find out the contents of a deed, and can be considered as having notice of it only as it appears of record. The rule that the deed is notice from the time it is left for record is subject to the qualification that it is correctly transcribed. When the record itself is defective, it is notice of only what appears upon it. If, for instance, a mortgage for three thousand dollars be, by mistake of the recorder, registered as for three hundred dollars, or a mortgage for four hundred dollars be registered as two hundred dollars, it is notice to subsequent *bonâ fide* purchasers of a lien of only that amount.⁴ It is no part of the purchaser's duty to search the original papers to find out whether the recorder has correctly spread their contents upon the record. The obligation of giving notice rests upon the party holding the title. If the recorder occasions a loss on his part by incorrectly transcribing the deed, he may recover damages of the recorder for such loss.⁵

551. Third persons are not prejudiced by errors in recording. — Third persons are not required to go beyond the registry to ascertain whether the title is good. If there is any error or omission in the registry of a mortgage, the mortgagee must suffer for it rather than others, who afterwards consult the records and

¹ Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252.

² N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Frost v. Beekman, 1 Johns. (N. Y.) Ch. 288; 18 Johns. 544; Johns v. Scott, 5 Md. 81; Heister v. Fortner, 2 Binn. (Pa.) 40.

³ Thompson v. Mack, Harr. (Mich.) 150; Weed v. Lyon, Ib. 363.

⁴ Frost v. Beekman, 18 Johns. (N. Y.) 544; Peck v. Mallams, 10 N. Y. 509; Terrell v. Andrew County, 44 Mo. 309. See Jennings v. Wood, 20 Ohio, 261, where a mistake was made in the grantor's name.

⁵ Terrell v. Andrew County, *supra*.

find no incumbrance by mortgage upon the estate. He may in some cases have recourse against the recorder for damages occasioned by his errors or omissions in recording; but otherwise the loss so occasioned must fall upon him.¹

552. Exception when by statute the deed is made operative as a record from the time it is filed for record. — Where the law makes the record complete as constructive notice from the time of the delivery of the mortgage to the recording officer to be recorded, it follows that any error in transcribing the deed, as for instance in the date of the deed or of the acknowledgment,² or in the sum secured by it, does not prejudice the mortgagee.³ The mortgagee is then regarded as having discharged his entire duty when he has delivered his mortgage, properly executed and acknowledged, to the recording officer, and as being in the same attitude as if the deed were at that moment correctly spread upon the record book. No subsequent mistake can deprive the deed of its operation as a recorded instrument. A mistake of the officer in transcribing the mortgage, by which it is made to appear to be a security for a smaller amount than is actually provided for by it, does not impair the mortgage as a security for the amount for which it was actually given, although subsequent purchasers and creditors relying upon the record have taken the incumbrance to be only the amount there disclosed.

The lien of the mortgage begins when it is left for record and entered in a proper entry book, required to be kept for the purpose of showing what deeds or mortgages are left for record. The mortgagee is under no obligation to supervise the work of the recorder, and see that he spreads the deed upon record, or that he puts it upon the index.⁴

553. The index is no part of the record, and a mistake in it

¹ Taylor v. Hotchkiss, 2 La. Ann. 917.

² Wood's Appeal, 82 Pa. St. 116; S. C. 16 Am. Law Reg. 255; Brooke's Appeal, 64 Pa. St. 127; Musser v. Hyde, 2 W. & S. (Pa.) 314.

³ Mims v. Mims, 35 Ala. 23. See Code of Ala. 1539. "The conveyance is operative as a record from the day of the delivery." A similar view was taken under a statute of ILLINOIS, providing that deeds

"shall take effect and be in force from and after the time of filing the same for record." Merrick v. Wallace, 19 Ill. 486, 497. So also in OHIO, where the statute provides that a deed "shall take effect and have preference from the time the same is delivered to the recorder." Tousley v. Tousley, 5 Ohio St. 78.

⁴ Wood's Appeal, 82 Pa. St. 116.

does not invalidate the notice afforded by a record otherwise properly made.¹ Although the mortgage be omitted from the index, it is just as much an incumbrance upon the land, and notice of it, from the time it was left for record or transcribed, affects all subsequent purchasers.² The general policy of the recording acts is to make the filing of a deed, duly executed and acknowledged with the proper recording officer, constructive notice from that time; and although it be provided that the register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed, not for the protection of the party recording his conveyance, but for the convenience of those searching the records; and instead of being a part of the record, it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed, as well as recorded, in order to make it a valid notice.³

¹ Green v. Garrington, 16 Ohio St. 548.

² Curtis v. Lyman, 24 Vt. 338; Board of Commissioners v. Babcock, 5 Oregon, 472; Throckmorton v. Price, 28 Tex. 605.

³ Mutual Life Ins. Co. v. Dake, 1 Abb. (N. Y.) N. C. 381.

Mr. Justice Smith, delivering the opinion of the court, said: "It is not a little surprising to find that a question so likely to come up frequently has not arisen in any reported case in this state. I suppose the usual practice in searching the records in the clerk's office is to consult the index, and to rely upon it. That is obviously the most convenient way; and if the index is full and accurate, it saves the necessity of going through the records themselves. But if the index is imperfect and misleads the searcher, as appears to have been the case here, who is to suffer — the party who duly transcribed his mortgage in the record book, or the party who, relying on the index, omitted to look at the record? The question is to be answered by determining whether the index is an essential part of the record, — that is to say, whether it is necessary to the completeness and efficiency of the record as a notice to after purchasers." After examining the statutes and reaching the conclusion that the index is no part of the record, he continues: "In

reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records. But the duty of the court is only to declare the laws as the legislature has laid it down. Arguments *ad inconvenienti* may sometimes throw light upon the construction of ambiguous or doubtful words; but where, as here, the language of the law makes it plain, they are out of place. Inconveniences in practice will result whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk."

The same rule was applied under analogous statutes in New York relating to the filing of chattel mortgages. *Dodge v. Potter*, 18 Barb. (N. Y.) 193; *Dikeman v. Puckhafer*, 1 Abb. (N. Y.) Pr. N. S. 32. These cases hold that the mortgagee, by filing and depositing his mortgage with the clerk, did all that he could do, and all that he was required to do, in order to perfect his claim, and that the omission of the mortgage from the index, being without his fault or knowledge, did not prejudice him.

When a grantee has delivered his deed to the recorder, notice of its contents is imparted from that time, if it is correctly spread upon the record. He has done all the law requires of him for his protection. The purpose of the index is only to point to the record, but constitutes no part of it.¹

In Pennsylvania, however, under statutes not materially different from those of New York, the reasoning of Mr. Chief Justice Woodward in a late case was, that the mortgage not duly indexed was not constructive notice to third persons; that as a guide to inquirers, the index is an indispensable part of the recording; and that, without it, the record affects no party with notice.² In this case the purchaser had actual notice of the existence of the mortgage, and therefore could not complain of the want of record; and in that view what was said by the court as to the sufficiency of the record was not material to the result.

554. Remedy for damages occasioned by errors in the index. — Under this rule one who in good faith has taken a subsequent deed or mortgage of the property, on the faith of finding no incumbrance upon the index, might probably have a remedy for damages against the register, whose duty it was under the law to make the index.³ In Missouri a statute provides that a recorder who neglects or refuses to keep an index to the books of record shall pay to the party aggrieved double the damages which may be occasioned thereby; but the court has suggested that before a purchaser can recover for the failure of the recorder to index a prior mortgage upon the property, he must show that the damage arose from the recorder's neglect, and not from other causes; as for instance his own reliance upon false outside representations as to the title without an examination of the index, or from his mistaken reliance upon the covenants of the grantor.⁴

555. Error in descriptive index. — A recital in a mortgage for purchase money, that the premises are the same conveyed to the mortgagor by the mortgagee by deed of even date is generally sufficient notice of the mortgage when recorded, although by mistake the lot described is an entirely different lot. Yet in Iowa,

¹ Bishop v. Schneider, 46 Mo. 472.

² Speer v. Evans, 47 Pa. St. 141.

³ Mut. Life Ins. Co. v. Dake, 1 Abb. (N. Y.) N. C. 381, per Smith, J.

⁴ Bishop v. Schneider, 46 Mo. 472.

where the laws require a descriptive index to be kept, this recital is held to be an insufficient notice of the conveyance of the lot referred to in the recital, inasmuch as the lot described would appear in the index, and not the lot referred to in the recital.¹ In that state the descriptive index is an important part of the notice afforded by the record, though it is not necessary that the descriptive part of the index should contain more than a reference to the record; and where a description by plan or survey is impracticable, a reference "to certain lots of land,"² or "see record,"³ has been held sufficient. But where the mortgage covered two lots of land, but the description of one of them only was entered in the descriptive column of the index, it was held that the record did not impart constructive notice of the lot not described, and that the consequences of the recorder's error should fall upon the mortgagee rather than upon subsequent purchasers.⁴ The record, though complete in every other respect, except that it is not properly indexed, does not operate as constructive notice.⁵

Yet, while an index is insufficient, if it would mislead an inquirer by giving a totally wrong description, a mistake in the index reference to the page of the book where the instrument is recorded, the names of the grantor and the grantee being correctly given, does not prevent its operating as constructive notice of the acts which would be disclosed by an examination of the record. The record book and the index book are not considered detached and independent books, but are related and connected, and a party is affected with notice of the contents of the record, when an ordinarily diligent search will bring him to a knowledge of such contents. To a competent examiner of the records, finding the name of one entered upon the index as having made a mortgage, it would occur that it was much more likely that the recorder should make an error in entering the page of the record, than that he should mistake the name of the mortgagor, or should enter his name at all if he had not recorded the deed.⁶

556. A mortgage defectively recorded is an equitable lien. But although a mortgage be defectively recorded, or not re-

¹ *Scoles v. Wilsey*, 11 Iowa, 261; *Whalley v. Small*, 25 Iowa, 184; *Calvin v. Bowman*, 10 Iowa, 529.

² *Bostwick v. Powers*, 12 Iowa, 456.

³ *White v. Hampton*, 13 Iowa, 259.

⁴ *Noyes v. Horr*, 13 Iowa, 570.

⁵ *Gwynn v. Turner*, 18 Iowa, 1.

⁶ *Barney v. Little*, 15 Iowa, 527.

corded at all, so that it has no effect as against subsequent purchasers in good faith, yet it is a good equitable lien, and is superior to the claims of creditors under subsequent judgments; and is superior to the claims of general creditors who were such at the date of the mortgage;¹ and is superior to a subsequent voluntary assignment by the mortgagor for the benefit of creditors.² In like manner a mortgage defectively executed, as for instance attested by only one witness when two are required, is a good equitable mortgage.³ According to the authorities in some states, however, a mortgage defectively recorded, or not recorded at all, gives no priority to the mortgagee over any other creditor.⁴ As against third parties having notice of such mortgage, it is also a good specific lien which will be enforced against them in equity.⁵

Such equitable mortgages have been held to be superior to the claims of the mortgagor's general creditors. This was the rule in South Carolina before the Act of 1843, now embodied in the Revised Statutes of that state. A legal mortgage not recorded, or an equitable mortgage incapable of record, was preferred to a subsequent creditor without notice. The consequence of imparting validity to unrecorded mortgages is said to have wrought much injury by impairing confidence in titles, and thereby depreciating the value of real estate. The act above referred to placed subsequent creditors and purchasers upon the same footing.⁶

6. *The Effect of a Record duly made.*

557. The record of a mortgage is constructive notice of its contents to all subsequent purchasers and mortgagees.⁷ As to

¹ *Lake v. Doud*, 10 Ohio, 415; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21; otherwise, however, under later cases in Ohio: *White v. Denman*, 1 Ohio St. 110; *Bloom v. Noggle*, 4 Ohio St. 45; *Sixth Ward Build. Ass'n. v. Willson*, 41 Md. 506; and see *Price v. McDonald*, 1 Md. 403; *Phillips v. Pearson*, 27 Md. 242; *Bibb v. Baker*, 17 B. Mon. (Ky.) 292.

² *Nice's Appeal*, 54 Pa. St. 200.

³ *Abbott v. Godfroy*, 1 Mich. 178.

⁴ *Henderson v. McGhee*, 6 Heisk. (Tenn.) 55.

⁵ *Racouillat v. Sansevain*, 32 Cal. 376.

⁶ *Boyce v. Shiver*, 3 S. C. 515. "There is not a single modern writer, whose opin-

ion carries weight, who does not regret that the courts ever favored the introduction of secret liens."

⁷ *Humphreys v. Newman*, 51 Me. 40; *Hall v. McDuff*, 24 Me. 311; *Bolles v. Chauncey*, 8 Conn. 389; *Peters v. Goodrich*, 3 Conn. 146; *Dennis v. Burritt*, 6 Cal. 670; *McCabe v. Grey*, 20 Cal. 509; *Clabaugh v. Byerly*, 7 Gill (Md.), 354; *Sonder v. Morrow*, 33 Pa. St. 83; *Johnson v. Stagg*, 2 Johns. (N. Y.) 510; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Buchanan v. International Bank*, 78 Ill. 500; *Barbour v. Nichols*, 3 R. I. 187; *Doyle v. Stevens*, 4 Mich. 87; *Ogden v. Walters*, 12 Kas. 282.

them the mortgage takes effect not because of its prior execution, but by reason of its prior record. The mortgage is in the line of their title, and by the record they become bound by it as much as the mortgagor himself.¹ It is notice only to subsequent purchasers and incumbrancers, and not to those who have prior rights, or even to those whose rights are contemporaneous with those of the mortgagor, as for instance to his co-tenants; therefore a mortgage by one tenant in common, though duly recorded, is no notice to his co-tenant of its existence, or of the claim of the mortgagor to the exclusive ownership of the land.²

When a mortgage is recorded prior to another conveyance from the mortgagor, it does not matter that this conveyance was made in pursuance of a contract entered into after the execution of the mortgage, and before the record of it, if nothing had been done towards carrying the contract into execution at the time of the filing of the mortgage for record.³ From that time it is constructive notice to all who may afterwards acquire any interest in the same property.

A mortgage duly recorded is notice not only of the existence of the mortgage, but of all its contents.⁴ It is notice too of the covenants contained in it.⁵ Although the debt be not fully described the record is notice of all that is said about it, and a purchaser is bound by the statements made, and by the information he is put upon the inquiry to find out.⁶ It is notice of the statements in it regarding the debt, whether the description be fully set out, or consists of references to other instruments.⁷ It is notice not only to purchasers but to subsequent creditors as well. They cannot complain that the transaction is fraudulent, unless they can show that the object of the conveyance was to avoid subsequent indebtedness.⁸

558. Priority once gained cannot be lost. — The registry of a mortgage is equivalent to a notice of it to all persons who may subsequently become interested in the property, and fully protects

¹ *Tripe v. Marcy*, 39 N. H. 439; *Grandin v. Anderson*, 15 Ohio St. 286; and see *Leiby v. Wolf*, 10 Ohio, 83.

² *Leach v. Beattie*, 33 Vt. 195.

³ *Kyle v. Thompson*, 11 Ohio St. 616.

⁴ *Thomson v. Wilcox*, 7 Lans. (N. Y.) 376.

⁵ *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103.

⁶ *Youngs v. Wilson*, 27 N. Y. 351, reversing 24 Barb. 510.

⁷ *Dimon v. Dunn*, 15 N. Y. 498.

⁸ *Hickman v. Perrin*, 6 Coldw. (Tenn.) 135.

the mortgagee's rights. Once having obtained priority by record, it does not subsequently lose its place by being held by any one under an unrecorded assignment. And although the mortgagee had notice of a prior unrecorded mortgage, or there are equities such that his own mortgage is in his hands subject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities, the assignee is entitled to hold the mortgage as a prior lien upon the land, solely upon the ground that it was first recorded.²

Having recorded his mortgage, the mortgagee is not bound to give personal notice of his mortgage to one who purchases of the mortgagor; and a delay for ten years, or for any other period less than the statute period of limitation, to make any claim of the purchaser under the mortgage, does not impair his rights under the mortgage either at law or in equity; and the fact that the mortgagor has in the mean time become insolvent does not prejudice his claim upon the property.³

A mortgage being duly recorded, the subsequent dealings of the mortgagor and others claiming under him have no effect whatever upon it. If, for instance, the mortgagor subsequently sells the land and reserves a right of way, this right remains subject to the title of the mortgagee, and a sale under a mortgage destroys it, as well as the title to the remainder of the land.⁴

In accordance with these principles, it follows that a junior mortgage duly recorded, without notice of a prior unrecorded mortgage, has precedence of it;⁵ in other words, the mortgages take precedence in the order of the record. This precedence follows them through any subsequent transfers, or through any proceedings to enforce the liens. When the mortgage first recorded is foreclosed, a purchaser at the foreclosure sale obtains a complete and absolute title. But a purchaser at a foreclosure sale,

¹ *Brinekerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65; *Tuthill v. Dubois*, 4 Johns. (N. Y.) 216; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Campbell v. Vedder*, 3 Keyes (N. Y.), 174; S. C. 1 Abb. Dec. 295; and see *Douglass v. Peele*, 1 Clark (N. Y.), 563; *Johnson v. Stagg*, 2 Johns. (N. Y.) 510.

² *Corning v. Murray*, 3 Barb. (N. Y.) 652.

³ *Dick v. Baleh*, 8 Pet. 30; *Rice v. Dewey*, 54 Barb. (N. Y.) 455.

⁴ *King v. McCully*, 38 Pa. St. 76.

⁵ *Taylor v. Thomas*, 5 N. J. Eq. (1 Halst.) 331; *Grant v. Bissett*, 1 Caines (N. Y.) Cas. 112; *Pomet v. Scranton*, 1 Miss. (Walk.) 406; *Harrington v. Allen*, 48 Miss. 493; *Routh v. Spencer*, 38 Ind. 393; *Psychaud v. Citizens' Bank*, 21 La. Ann. 262; *Harang v. Plattsmier*, Ib. 426.

under the mortgage recorded next in order of time, obtains only an equity of redemption of the prior mortgage.¹

559. Though the record be destroyed. — The destruction of the record of a deed in no manner affects the constructive notice afforded by its having been recorded.² If the mortgage itself has been preserved, the recorder's certificate of its having been duly recorded is of the highest class of evidence.³ So, also, the index book in which the deed is described, and its record certified in the proper book, are good evidence of the fact that the deed was recorded.⁴ Other evidence may show that the deed was filed for record; and when this is the case, the testimony of an attorney of a purchaser, that he examined an abstract of the title to the property, which purported to be a full and complete abstract, and did not find a prior deed of trust upon the premises, is not sufficient to show that there was no record of it, as it does not follow that the abstract was what it purported to be.⁵

Where the registry office and its records have been destroyed by fire, evidence of the execution of a mortgage and of its loss, with slight circumstances in regard to the recording of it, have been held enough to sustain a presumption that it was recorded as against a prior mortgagee who claims priority on the ground that such mortgage was never recorded.⁶

560. Purchase without notice of unrecorded mortgage. — Any one purchasing land in good faith, and without notice of an unrecorded mortgage, takes it discharged of the lien;⁷ and he can convey a good title to it, although the mortgage is recorded before he conveys and his vendee has notice of it.⁸ Having no actual notice of the mortgage, the purchaser is not bound to look beyond

¹ *Tice v. Annin*, 2 Johns. (N. Y.) Ch. 125; *Mathews v. Aikin*, 1 N. Y. 595; *Vanderkemp v. Shelton*, 11 Paige (N. Y.), 28; *Gilbert v. Averill*, 15 Barb. (N. Y.) 20; *Buchanan v. International Bank*, 78 Ill. 500.

² *Steele v. Boone*, 75 Ill. 457.

³ *Alvis v. Morrison*, 63 Ill. 181.

⁴ *Alvis v. Morrison*, *supra*.

⁵ *Steele v. Boone*, 75 Ill. 457.

⁶ *Alston v. Alston*, 4 S. C. 116.

⁷ *Holbrook v. Dickenson*, 56 Ill. 497; *Hodgen v. Guttery*, 58 Ill. 431; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Burke v. Allen*, 3 Yeates (Pa.), 351.

⁸ *Rounds v. McChesney*, 7 Cow. (N. Y.) 360; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *Bush v. Lathrop*, 22 N. Y. 535, 549; *Jackson v. Given*, 8 Johns. (N. Y.) 137; *Cook v. Travis*, 20 N. Y. 400; *Losey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246.

the line of title in his grantor; and finding that he acquired a good title he is not bound to look further; he acquires all the right and title that his grantor acquired. His grantor being entitled to protection against a prior unrecorded mortgage, he is entitled to the same protection, notwithstanding the notice he himself had of such mortgage, and although he is not a purchaser for a valuable consideration.¹

Not only is a purchaser without notice of a prior unrecorded mortgage, or of other equitable claim to the property, entitled to protection, even though he takes the title from one who had actual notice of such claim, but also a purchaser with notice from one who was entitled to protection as a *bonâ fide* purchaser without notice is himself entitled to protection against the previous equitable claim upon the estate; for otherwise a *bonâ fide* purchaser might be deprived of the power of selling his property for its full value. This protection extends to all persons claiming through the mortgage, whether they had notice at the time of the purchase or not.²

561. When a mortgage is made by one before he has acquired title.—If one having no title to land conveys it in mortgage with covenants of warranty, and this is duly recorded, and afterwards the mortgagor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in interest in the mortgagee, so that by operation of law the title is considered as vested in him in the same manner as if it had been conveyed to the mortgagor before he executed the mortgage. The mortgagor is estopped to say he was not then seised. Then, if the mortgagor executes another mortgage, and this and the deed by which the mortgagor acquired his title are both recorded together, which mortgagee has the better title? The estoppel binds not only the mortgagor and his heirs but his assignee as well. The second mortgagee is therefore estopped to aver that the grantor was not seised at the time of his making the first mortgage, and that mortgage being first recorded must have priority.³

¹ Wood v. Chapin, 13 N. Y. 509; Webster v. Van Steenberg, 46 Barb. (N. Y.) 211; Crane v. Turner, 7 Hun (N. Y.), 357.

² Varick v. Briggs, 6 Paige (N. Y.), 323; Cook v. Travis, 22 Barb. (N. Y.) 338; 20 N. Y. 400.

³ White v. Patten, 24 Pick. (Mass.) 324;

562. Deeds made and recorded subsequently to the mortgage are not notice to the mortgagee. — After the mortgage is made and recorded, the record of any deeds subsequently made by the mortgagor is not notice to the mortgagee;¹ and if he has no actual knowledge of any such subsequent deed, he may, without receiving anything upon the mortgage debt, release any portion of the mortgaged property to the mortgagor without impairing his security upon the remaining land for the whole mortgage debt, although if he had notice of a sale of any part of the remaining land, he might be obliged to abate a proportionate part of the mortgage debt in order to protect the purchaser. The equity which entitles a subsequent mortgage incumbrancer to the benefit of such a release, arises only when the first mortgagee gives it with knowledge at the time of the existence of the subsequent incumbrance. If the subsequent incumbrance be a mechanic's lien, the mere fact that the building was commenced after the mortgage was given, and that the mortgagee knew this, is not sufficient to charge him with knowledge of the lien.²

Whatever may be the equities of the subsequent mortgagee, a prior mortgagee is not bound by them unless he has actual notice, or such notice as should put him upon inquiry.³ There can be no retrospective effect to the record. A mortgagee, having recorded his deed, secures the protection of the registry laws, and he is not required to search the record from time to time to see whether other conveyances have been put upon the record. While

Tefft v. Munson, 57 N. Y. 97; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.), 361; *Doyle v. Peerless Petroleum Co.* 44 Barb. (N. Y.) 239; *Wark v. Willard*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 N. H. 533; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Pike v. Galvin*, 29 Me. 183; *Philly v. Sanders*, 11 Ohio St. 490; *Jarvis v. Aikens*, 25 Vt. 635. See, however, *White & Tudor's Lead. Cases in Eq.* 4th Am. ed. vol. 2, pt. 1, p. 212.

¹ *Birnie v. Main*, 29 Ark. 591; *George v. Wood*, 9 Allen (Mass.), 80; *James v. Brown*, 11 Mich. 25; *Doolittle v. Cook*, 75 Ill. 354; *Iglehart v. Crane*, 42 Ill. 261; *Halsteads v. Bank of Ky.* 4 J. J. Marsh. (Ky.) 558; *King v. McVickar*, 3 Sandf. (N. Y.) Ch. 192; *Truscott v. King*, 6 Barb.

(N. Y.) 346; *Stuyvesant v. Hall*, 2 Barb. (N. Y.) Ch. 151; *Raynor v. Wilson*, 6 Hill (N. Y.), 469; *Taylor v. Maris*, 5 Rawle (Pa.), 51; *Hill v. McCarter*, 27 N. J. Eq. 41; *Blair v. Ward*, 2 Stockt. (N. J.) 126; *Van Orden v. Johnson*, 1 McCarter (N. J.), 376; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Cooper v. Bigly*, 13 Mich. 463; *Lieby v. Wolf*, 10 Ohio, 83; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Wheelwright v. De Peyster*, 4 Edw. (N. Y.) Ch. 232; *Talmage v. Wilgers*, Ib. 239, n.; *Stuyvesant v. Hone*, 1 Sandf. (N. Y.) Ch. 419; *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509.

² *Ward v. Hague*, 25 N. J. Eq. 397.

³ *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, Ib. 509.

the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the second mortgagee to take care of his own interests, than upon the first mortgagee to take care of them for him. To make it the duty of the first mortgagee to inquire before he acts, lest he may injure some one, would be to reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself.¹

In like manner, the recording of a mortgage affords no notice whatever to a prior purchaser of the land, who is in possession under a bond for a deed, so that the mortgagee had constructive notice of his rights, and without actual notice he may lawfully complete his payments to his vendor, without becoming liable to such mortgagee.²

563. The extent of the lien. — The record of the mortgage is notice of an incumbrance for the amount specified in it, or so referred to as to put subsequent purchasers upon inquiry as to the extent of the lien.³ It is not notice of any claim which is not so specified or referred to.⁴ Subsequent purchasers are bound by nothing more than is disclosed by record, unless express notice is proved. As against them, if the mortgage debt is not payable with interest they cannot be prejudiced by any change of interest; although in case there be other security for the debt, they cannot object to the application of that to the payment of interest in the first place.⁵ But actual notice of the amount secured by a mortgage is binding upon a subsequent purchaser, although there be a mistake in the record.⁶

564. Extension of mortgage. — An agreement for further time, and a higher rate of interest, unless duly executed and recorded, is not binding upon the property, or upon subsequent purchasers, unless duly executed and recorded. It is merely a personal obligation between the parties, and the increased indebtedness cannot operate as a lien upon the land.⁷ An agreement for extension duly recorded, but which does not identify the mort-

¹ *James v. Brown*, 11 Mich. 25; *Birnie v. Main*, 29 Ark. 591. See § 372.

⁵ *Lash v. Edgerton*, 13 Minn. 210.

⁶ *Frost v. Beekman*, 1 Johns. (N. Y.) Ch.

² *Doolittle v. Cook*, 75 Ill. 354.

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³ *Youngs v. Wilson*, 27 N. Y. 351; *Dean v. De Lezardi*, 24 Miss. 424.

⁷ See § 361; *Davis v. Jewett*, 3 Greene (Iowa), 226; *Gardner v. Emerson*, 40 Ill.

⁴ *Hinchman v. Town*, 10 Mich. 508.

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gage by any sufficient reference, has no greater effect by reason of the record.¹

565. Rate of interest. — The mortgage is a lien only for the rate of interest specified in it, or for the rate established by law, when it is simply made payable with interest.² If the parties to the mortgage subsequently agree upon an advanced rate, this agreement is not binding upon subsequent purchasers, unless it is executed with the formalities which entitle it to be recorded, and is in fact duly recorded before others acquire any interest in the property.

In like manner, where a mortgage was given without interest, but with a verbal agreement that the mortgagee should receive certain rents in lieu of interest, he cannot as against a subsequent mortgagee, who had no notice of this agreement, enlarge his demand beyond what appeared of record, and claim a lien upon the property for the payment of interest as well as principal.³

After the making of a mortgage, the parties to it cannot make an agreement for the payment of a higher rate of interest than that stipulated for in the mortgage, that will be a lien upon the premises as against a purchaser of the property before such agreement was made, or after it was made, but without notice of it.⁴

But in case of a mortgage for the purchase money, the wife having no right of dower except in the surplus above the mortgage, an agreement to pay a higher rate of interest in consideration of an extension of time may be enforced against the property, so far as the wife's dower is concerned.⁵

566. The recording acts do not apply to mortgages simultaneously recorded. — The recording acts have no application to mortgages executed and recorded simultaneously.⁶ Neither have they any application to mortgages executed at the same time and held by the same person, for he has, of necessity, notice of both

¹ *Bassett v. Hathaway*, 9 Mich. 28.

⁵ *Thompson v. Lyman*, 28 Wis. 266.

² See § 361; *Whittacre v. Fuller*, 5 Minn. 508.

⁶ *Stafford v. Van Rensselaar*, 9 Cow. (N. Y.) 316; aff'd S. C. *Hopk.* (N. Y.)

³ *St. Andrew's Church v. Tompkins*, 7 Johns (N. Y.) Ch. 14.

569; *Douglass v. Peele, Clarke* (N. Y.), 563.

⁴ *Bassett v. McDonel*, 13 Wis. 444.

mortgages.¹ The record of one before the other is in such case without effect. Such mortgages are concurrent liens whether in the hands of the mortgagee, or in the hands of assignees. Nor have they any application when the mortgages expressly declare that neither is to have precedence of the other, but are to be alike security for the several debts.² Nor have they any application as between two mortgages given for purchase money at the same time; and when this fact appears upon the face of the deeds, the prior record of one gives it no priority over the other.³ The rights of the parties in such cases may sometimes be controlled by other considerations; and if there be any priority of one over the other, that priority is determined by considerations of equity. Equitable rights and agreements as to priority are recognized and enforced only in courts of equity.⁴

The only effect of recording an assignment of a mortgage is to protect the assignee from a subsequent sale of the mortgage; the assignment when not recorded is void as against a subsequent purchaser of the mortgage. Therefore, when two simultaneous mortgages of the same land are made under an agreement that they shall be equal liens, the prior record of one gives it no preference over the other. Such a mortgage is not within the terms of a statute declaring an unrecorded conveyance void against a *subsequent* conveyance *first* recorded. A simultaneous conveyance is not a subsequent conveyance. An assignment is a conveyance of a mortgage, and if it be not recorded it is void against a subsequent purchaser of the mortgage.⁵

If an assignee of one of two simultaneous mortgages be regarded as a subsequent purchaser of some interest in the real estate, then he is affected by the record of the other mortgage, as well as that of which he has taken an assignment; and if either or both contain a recital showing that they are simultaneous, or that both were given for the purchase money of the same land, then the prior record of one can give it no preference over the other.⁶

¹ *Gausen v. Tomlinson*, 23 N. J. Eq. 405.

² *Howard v. Chase*, 104 Mass. 249.

³ *Greene v. Deal*, N. Y. W. Dig., reversing S. C. 4 Hun, 703.

⁴ *Jones v. Phelps*, 2 Barb. (N. Y.) Ch. 440.

⁵ *Greene v. Warnick*, 64 N. Y. 220.

⁶ *Greene v. Warnick*, *supra*.

567. Simultaneous mortgages for purchase money. — Where two or more mortgages are made simultaneously to different persons, and are so connected with each other that they may be regarded as one transaction, each mortgagee having notice of the other mortgage, they will be held to take effect in such order of priority or succession as shall best carry into effect the intention and best secure the rights of all the parties.¹ If there be no intention to give any preference to either, no preference as between the mortgagees can be obtained by priority of record.² The recording acts in such case have no application. But if one of such mortgages be assigned to a purchaser in good faith without notice of any superior equity in the holder of the other mortgage, such assignee is entitled to the priority gained by an earlier record of his mortgage, even if the other mortgage was superior in equity.³

If two mortgages be made to the same person to secure purchase money, though in the mortgagee's hands one has no priority over the other, he may assign one in such a way as to give it priority over the other subsequently assigned by him.

568. Simultaneous mortgages of which one is for purchase money. — If a purchaser of land, at the instant of receiving his deed, executes and delivers two mortgages of it, one to his grantor, to secure a payment of a part of the purchase money, and the other to a third person, and all the deeds are entered for record at the same moment, the mortgage to his grantor takes precedence. The deed and the mortgage for the purchase money are parts of one transaction, and give the purchaser only an instantaneous seisin. Moreover, the deed and mortgages being all delivered at the same time, the several grantees must be considered as knowing all that took place concerning them, and the third person, therefore, as knowing of the mortgage for the purchase money, to which his own became subject as effectually by his knowledge of its existence, as it would have been if it had been posterior in time of entry for record.⁴

¹ *Pomeroy v. Latting*, 15 Gray (Mass.), 545; *Sparks v. State Bank*, 7 Blackf. (Ind.) 435; *Jones v. Phelps*, 2 Barb. (N. Y.) Ch 469.

440; *Douglass v. Peele, Clarke* (N. Y.), ³ *Corning v. Murray*, 3 Barb. (N. Y.) Ch. 563. 652.

² *Rhoades v. Canfield*, 8 Paige (N. Y.), ⁴ *Clark v. Brown*, 3 Allen (Mass.), 509.

But although executed and delivered at the same time, so that they take effect upon the estate at the same instant, if the recording of the purchase money mortgage is delayed and the other is first recorded, it will, in the absence of any notice of the purchase money mortgage, be held to be superior in right.¹

569. The English doctrine of tacking² has no application to registered mortgages. These are payable according to the priority of their record.³ Another kind of tacking arises when the mortgagee attaches to the mortgage lien other debts not included in the mortgage. This he may do, so far as the mortgagor is concerned, when an express or implied agreement exists allowing him to do so; but he cannot tack other debts to his mortgage as against intervening mortgagees and judgment creditors.⁴

¹ *Dusenbury v. Hulbert*, 2 Thomp. & Co. (N. Y.) 177.

² Tacking in England was abolished by the Vendor and Purchaser Act of 1874. The dimensions to which the learning on this subject had grown may be gathered from the fact that in Mr. Coventry's edition of *Powell on Mortgages*, published in 1822, it occupies one hundred and twenty-five pages.

³ See §§ 357, 360; *Grant v. Bank of the U. S.* 1 Caines Cas. 112; *Wing v.*

McDowell, Walk. (Mich.) 175; *Chandler v. Dyer*, 37 Vt. 345.

It is prohibited by statute in Georgia. Code, 1873, § 1962.

See chapter xxii. on "REDEMPTION."

⁴ *Orvis v. Newell*, 17 Conn. 97; *Colquhoun v. Atkinsons*, 6 Munf. (Va.) 550; *Siter v. McClanachan*, 2 Gratt. (Va.) 280; *Towner v. Wells*, 8 Ohio, 136; *Hughes v. Worley*, 1 Bibb (Ky.), 200; *Chase v. McDonald*, 7 Har. & J. (Md.) 160; *Averill v. Guthrie*, 8 Dana (Ky.), 82.

CHAPTER XIII.

NOTICE AS AFFECTING PRIORITY.

1. *Notice as affecting Priority under the Registry Acts.*

570. The ground on which notice is allowed to affect registration. — Under the local registry acts in England, it has always been conceded that notice of a prior deed would supersede the effect of a prior registry.¹ The preamble of the statute of the 7th of Anne, providing for a registry in the county of Middlesex, recites in substance that, “by the different and secret ways of conveying lands, such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by prior and secret conveyances and fraudulent incumbrances;” and therefore it is enacted that a memorial of conveyances, made after the 27th of September, 1709, of lands in that county, may be registered; and that every deed “shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.” In a leading case, involving the construction of this act, Lord Hardwicke asks, what appears by the preamble to be the intention of the act? “Plainly,” he answers, “to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice

¹ The registry acts of England are as follows: West Riding of Yorkshire, 5 Anne, c. 18; East Riding of Yorkshire and Kingston-on-Hull, 6 Anne, c. 35; Middlesex, 7 Anne, c. 20; and North Riding of Yorkshire, 8 Geo. 2, c. 6. Under the Irish

registry act, 6 Anne, c. 2, which is materially different from the English, the record gives absolute priority, and the doctrine of notice is not admitted. *Bushell v. Bushell*, 1 S. & L. 98.

of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.”¹ After referring to several cases on the registry acts,² he continues: “Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this, that the taking of a legal estate after notice of a prior right makes a person *malâ fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. . . . Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law, *Fraus et dolus nemini patrocianari debent*.” Fraud or bad faith, therefore, is the ground on which the court, in this as well as in other cases, place the doctrine of notice as modifying the registry acts.³

571. The policy of admitting notice to affect the priority given by registration. — The doctrine of notice as laid down by Lord Hardwicke has been repeatedly affirmed in England, although it has been the subject of some criticism;⁴ and regret has been expressed that it has so far superseded the terms of the registry acts. In *Davis v. The Earl of Strathmore*,⁵ Lord Eldon said: “With regard to the observation thrown out at the bar,

¹ *Le Neve v. Le Neve*, 1 Ambler, 436; *White & Tudor's Lead*. Cas. vol. 2d, p. 109, 4th Am. ed.; and see *Neal v. Kerrs*, 4 Ga. 161.

² *Forbes v. Deniston*, 4 Bro. P. C. 189; *Blades v. Blades*, 1 Eq. Cas. Abr. 358, pl. 2; *Cheval v. Nichols*, 1 Stra. 664.

³ And see, also, *Hine v. Dodd*, 2 Atk. 275; *Tunstall v. Trappes*, 3 Sim. 301; *Cheval v. Nichols*, Str. 664. In the latter case it was said: “For where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and in a court of equity his purchase will never be established.”

⁴ *Benham v. Keane*, 7 Jur. N. S. 1096; J. & H. 685, and cases cited.

⁵ 16 Ves. 419; see, also, *Ford v. White*, 16 Beav. 123; *Wyatt v. Barwell*, 19 Ves. 438. In the latter case Sir Wm. Grant said: “It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, ‘We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.’”

that the registry acts were overturned by Lord Hardwicke, I should feel myself bound to consider those decisions right if they rested upon his authority alone ; but, confirmed as that doctrine has been ever since his time in cases directly upon those acts, and admitted to be right in questions upon other acts of parliament, I dare not venture to contradict it." In a recent case before the Court of Appeal¹ in chancery, the Chancellor, Lord Hatherley, after referring to the case of *Le Neve v. Le Neve* with approbation, said: "Whether it be prudent or imprudent that the law should continue in that state is not a matter which I have to discuss on the present occasion. Some think that the law should be rendered like that relating to ship registry ; but ship registers are of a very different character, and how far one rule or the other is right is not a matter which it is easy for anybody to determine. What has hitherto repressed those who have been anxious to do away with this doctrine of notice is, that there would always remain a very strong feeling on the part of mankind against a person who, knowing distinctly that his neighbor had lent a large sum of money, took a security subject to that, and then obtained priority by a previous registration, doing that which, as I held in *Benham v. Keane*,² this court will not allow to be done. This court will not allow a man who has already pledged his estate to pledge it a second time, and will not allow any person to assist him in so doing, by lending a second sum of money in this way."

572. The doctrine of notice as affecting priority is generally adopted in this country. — Subsequent purchasers, who have notice of a prior unrecorded mortgage, are affected by their knowledge of it in the same way that the prior record of the mortgage would affect them.³ The record is constructive notice only ; but it is notice to all the world that comes after. Any other notice must in the nature of things be limited in the extent of it, but so far as it goes, its effect is equitably not any less, certainly, than that of the record. Having notice of a mortgage

¹ *Rolland v. Hart*, L. R. 6 Ch. App. 678, and see numerous cases cited.

² 1 J. & H. 685 ; 7 Jur. (N. S.) 1096.

³ *Conover v. Von Mater*, 18 N. J. Eq. 481 ; *Bell v. Thomas*, 2 Iowa, 384 ; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469 ; *Woodworth v. Guzman*, 1 Cal. 203 ; *Nel-*

son v. Dunn, 15 Ala. 501 ; *Underwood v. Ogden*, 6 B. Mon. (Ky.) 606 ; *Lambert v. Nanny*, 2 Munf. (Va.) 196 ; *Butler v. Viele*, 44 Barb. (N. Y.) 166 ; *Fort v. Burch*, 5 Den. (N. Y.) 187 ; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260 ; *Musgrove v. Bonser*, 5 Oregon, 313.

defectively recorded, or not recorded at all, a subsequent purchaser cannot claim priority for his own deed.¹ As between him and the mortgagee, it is the same as if the prior mortgage had been duly recorded.² Therefore, priority among mortgagees and grantees depends not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of the facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds.³

Undoubtedly it was the purpose of the laws providing for the registry of conveyances of land, to enable every one by this means to determine fully the title to the land, without depending upon the possession of the title deeds, or upon inquiry or notice outside of the registry. The symmetry of the registry system has been disturbed and broken in upon by judicial construction, in order to prevent a fraudulent use of the statute which it is to be presumed the statute did not intend. To allow one who has actual or implied notice of a prior unrecorded deed of the same property, or such notice of equitable rights of other persons in the property, to obtain priority by recording his own deed, would be to enable him to take advantage of the registry laws to obtain an unfair or fraudulent advantage by means of them. Exceptions to the literal application of the law have therefore been engrafted upon it to meet the equitable consequences of such notice.⁴

573. Exception as to Ohio and North Carolina. — As already noticed, it has been questioned whether the courts ought ever to have suffered the question of actual notice to be agitated against one whose conveyance is duly registered.⁵

The basis of the doctrine of notice is, that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance or incumbrance of which he has knowledge.⁶ But it has

¹ *Johnston v. Canby*, 29 Md. 211; *Coe v. Winters*, 15 Iowa, 481; *Forepaugh v. Appold*, 17 B. Mon. (Ky.) 625.

² *Copeland v. Copeland*, 28 Me. 525; *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Ohio, & Co. v. Ross*, 2 Md. Ch. 25; *Smith v. Nettles*, 13 La. Ann. 241; *Pike v. Armistead*, 1 Dev. (N. C.) Eq. 110; *Solms v. McCulloch*, 5 Pa. St. 473; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260.

³ *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54.

⁴ See *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252, per Chief Justice Redfield.

⁵ Per Sir Wm. Grant, in *Wyatt v. Barwell*, 19 Ves. 439; per Colcock, J., in *Price v. White*, Bail. Eq. (S. C.) 240.

⁶ *Harrington v. Allen*, 48 Miss. 492.

been doubted whether this doctrine does not give occasion to more fraud than it prevents; and whether vigilance in recording a mortgage should not be rewarded as much as vigilance in obtaining it.¹

Under the registration law in North Carolina it is held that no notice, however full and formal, will supply the place of registration of a deed of trust or mortgage; the statute declaring that they shall not be valid at law to pass any property as against creditors or purchasers for a valuable consideration, but from their registration.²

Under the recording acts of Ohio it is held that the doctrine of notice has no place, but that mortgages have priority of lien in the order of their delivery for record, whatever notice a mortgagee may have of a prior unrecorded mortgage or other conveyance.³ Inasmuch as a mortgage is declared to take effect only from the time it is left for record, a judgment recovered after the date of the mortgage, and before it is recorded, takes precedence of it.⁴

The admission of evidence of actual notice of a prior unrecorded deed, as affecting a mortgagee's right of priority, is attended with all the danger and uncertainty incident to parol evidence, when used for the purpose of affecting written instruments and disturbing titles, and for this reason the policy has been adopted in these states of allowing the whole question of priority to be settled by the simple fact of prior registry. This furnishes a clear and certain standard of decision incapable of variation, and thus avoids a very fruitful source of litigation.⁵

574. The practical effect of the doctrine of notice upon registration.—As there is no difference between the effect of the constructive notice derived from the recording of a deed, and an actual notice, so far as respects the person receiving such actual notice, it may happen that a purchaser or mortgagee, though holding title in good faith under a regular chain of recorded conveyances, may yet have no title at all, for the reason

¹ Per Hitchcock, J., in *Mayham v. Mayham v. Coombs*, 14 Ib. 428; *Bloom v. Coombs*, 14 Ohio, 428.

² *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. (N. C.) Eq. 584; *Leggett v. Bullock*, Busb. (N. C.) L. 283.

³ *Stansell v. Roberts*, 13 Ohio, 148; 4 Ohio St. 45.

⁴ *Mayham v. Coombs*, 14 Ohio, 428.

⁵ Per Ranney, J., in *Bloom v. Noggle*,

that a grantor in the chain of title had knowledge, when he took the conveyance to himself, of a prior unrecorded mortgage or conveyance, which was, however, recorded before his own conveyance or mortgage to his grantee.¹ "Suppose, for instance," says Chief Justice Shaw, in an important case on this subject,² "A. conveys to B., who does not immediately record his deed. A. then conveys to C., who has notice of a prior unregistered deed to B. C.'s deed, though first recorded, will be postponed to the prior deed to B. Then, suppose B. puts his deed on record, and afterwards C. conveys to D. If the above views are correct, D. could not hold against B.; not in right of C., because, in consequence of actual knowledge of the prior deed, C. had but a

¹ This point is illustrated by the case of *Van Rensselaer v. Clark*, 17 Wend. 25. Derick Schuyler owned the premises in question on the 25th of August, 1794. He that day conveyed them to James Van Rensselaer, but the deed was not recorded until January 2, 1804. July 2, 1799, Derick Schuyler conveyed the same premises to Philip Schuyler, who had notice of the unrecorded deed to James Van Rensselaer. The deed to Philip Schuyler was recorded October 25, 1802. On the 2d of April, 1805, Philip Schuyler conveyed to Clark, who, in 1806, conveyed to Emott, who, in 1833, conveyed to Miller. The court held that Philip Schuyler was a *bonâ fide* purchaser; that the deed to Van Rensselaer being recorded before the deed from Philip Schuyler to Clark, the latter took the land chargeable with notice of the deed to Van Rensselaer; that although neither Clark, Emott, or Miller, had actual notice or knew of the deed from Derick Schuyler to Van Rensselaer, and although upon the examination of the records they found a regular recorded title in their respective grantors, yet the records informed them that Derick Schuyler had conveyed the premises to Van Rensselaer previously to the conveyance to Philip Schuyler. It was argued that Clark bought of Philip Schuyler on the faith of finding that his deed was first recorded, and that he should not be held to look further and run the hazard of actual notice to Philip Schuy-

ler. But it was held otherwise by the court; which decided, that to entitle a purchaser to protection under the recording acts he must not have notice which is inconsistent with good faith.

These principles have been affirmed in *Schnitt v. Large*, 6 Barb. (N. Y.) 373; *Ring v. Steele*, 3 Keyes (N. Y.), 450; *Jackson v. Post*, 15 Wend. (N. Y.) 588.

The following case is still later. On the 10th day of April, 1871, A., the owner of certain lands, mortgaged them for \$3,000 to B., who, on the 25th of July, 1871, delivered the same to C., and on the 28th of October, 1871, executed to him a formal assignment, which, with the mortgage, was recorded January 2, 1872. On September 13, 1871, A. conveyed the premises to D., who had actual knowledge of the mortgage to B., and of the consideration he had paid for it. This deed was recorded October 5, 1871. On the 16th of January, 1873, D. executed a mortgage upon the premises to E. for \$2,000, who assigned it to F., who had no notice of the first mortgage, except such constructive notice as was given by the record. It was held that when C. put the first mortgage on record, January 2, 1872, it was a complete and perfect title, and that the lien acquired by F., under the second mortgage, was subsequent to it. *Goelet v. McManus*, 1 Hun (N. Y.), 306.

² *Flynt v. Arnold*, 2 Met. (Mass.) 619.

voidable title; and not in his own right, because, before he took his deed, B.'s deed was on record, and was constructive notice to him of the prior conveyance to B. from A. under whom his title is derived. But in such case, if before B. recorded his deed, C. had conveyed to D. without actual notice, then D., having neither actual nor constructive notice of the prior deed, would take a good title. And, as D. in such case would have an indefeasible title himself against B.'s prior deed, so, as an incident to the right of property, he could convey a good and indefeasible title to any other person, although such grantee should have full notice of the prior conveyance from A. to B. Such purchaser, and all claiming under him, would rest on D.'s indefeasible title, unaffected by any early defect of title, by want of registration, which had ceased to have any effect on the title, by a conveyance to D. without notice, by one having a good apparent record title." The eminent judge examines the earlier cases in Massachusetts which were in conflict with these views, and in which it had been considered that the recording of the first deed, under the circumstances above supposed, might be evidence of actual notice to such purchaser thus taking his deed from the second grantee, but that it did not constitute that constructive notice, which would be conclusive, in favor of the first grantee. This is founded wholly on the suggestion made in one case, that "When a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further."¹ Referring to this proposition as incorrect, Chief Justice Shaw continues: "If the object of any one, in searching the record to ascertain the goodness of a title, is to inquire and ascertain whether any one through whom the title is derived, whilst he had the title, and had the power to aliene or incumber it, did so, then, by following the conveyances down from each former holder of the estate to the time of the search, he could find the alienation or incumbrance, if one had been made and recorded. The object of the registry is to give notoriety to all conveyances, and

¹ Per Jackson, J., in *State of Connecticut v. Bradish*, 14 Mass. 296, 303. The head-note in this case states a correct proposition of law, but in point of fact, in that case, the first mortgagee had put his deed on record before the assignment was made by the second mortgagee. But the court

treated this as only evidence to go to the jury, tending to show that the assignee of the second mortgage had actual notice of the prior mortgage, and not as being constructive notice. And see *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. (Mass.) 221.

make them certainly known to one inquiring. If an ordinarily diligent search would bring the inquirer to a knowledge of a prior incumbrance or alienation, then he is presumed to know it. It is this presumption, and not the fact of actual knowledge of a prior incumbrance, which binds all subsequent purchasers, and makes the registry conclusive evidence of notice. It serves all the purposes of actual knowledge, by enabling an inquirer with ordinary diligence to ascertain the fact. It would seem that a search, so far as to ascertain whether any former proprietor, whilst he had the estate, had aliened or incumbered it, would be necessary, in order to render the public registry available to the full extent to which it was designed by law; and therefore it would be reasonable to presume in each case that such search had been made, and if any such deed from a proprietor was on record, that it had been discovered, and was known to the subsequent purchaser."

575. When the title of the prior mortgagee may be perfected by record. — The right of the first purchaser or mortgagee to preserve his title by recording his deed, continues after any number of subsequent conveyances in the chain of title derived from the second grantee from the original grantor, although the deeds in this chain of title have all been duly recorded, provided that such subsequent purchasers, one and all, have bought either with knowledge of the prior unrecorded deed or without paying valuable consideration. So long as this state of things continues the prior title will hold, and may be perfected by record. But so soon as any one in the chain of title under the second conveyance purchases in good faith for a valuable consideration, and places his deed on record, the title under the first unrecorded deed is gone forever.¹

¹ This point is fully illustrated in the case of *Fallass v. Pierce*, 30 Wis. 443, which was several times argued before the court, and was finally decided in a well considered opinion by Chief Justice Dixon. Using the same illustration given above, he says: "If, for example, in the case supposed, C. took his deed with knowledge of the prior conveyance to B. and had then conveyed to D, who had like knowledge, and D. should convey to E. and so on, conveyances should be executed to the end of the

alphabet, each subsequent grantee having knowledge of B.'s prior right, and all of their conveyances being recorded, yet then, if B. should record his deed before the last grantee with knowledge, and Z. should make conveyance, the purchaser from Z. would be bound to take notice of B.'s rights, and of the relations existing between them, and all the subsequent purchasers from C. to Z. inclusive. And in the same case, if Z. should sell to a purchaser in good faith for value from him,

This class of cases very frequently present questions of the greatest difficulty ; and the language of Lord Chancellor Northington is generally applicable to any one of them : " This is one of those cases which are always very honorably labored by the counsel at the bar, and determined with great anxiety by the court, as some of the parties must be shipwrecked in the event."¹

576. A further illustration of the effect of notice in respect to an examination of the records.— As a general rule a purchaser is not bound to search the records for incumbrances as against a title that does not appear of record.²

Generally, therefore, the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the incumbrance to a subsequent purchaser.³ The whole object of the registry acts is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded, and to deprive the holder of previous unregistered conveyances of his right of priority, which he would have at the common law. The title upon record is the purchaser's protection. The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed. When one link in the chain of title is wanting, there is no clue to guide the purchaser in

yet if B. should get his conveyance recorded *before* that of such purchaser, his title would be preferred, because of such first record.

" And it is manifest that the same result would follow if in the case supposed none of the subsequent grantees, from C. to Z. inclusive, paid any valuable consideration for the land, or, if in the case of each successive grantee, his title was defective and invalid as against B., either by reason of his knowledge of B.'s title or because he was a mere volunteer, paying no consideration whatever for the conveyance." See *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. vol. 2, pt. 1, p. 212, for a dissent to this line of decisions, because they make it requisite to search for conveyances from two persons during the same period. The authorities cited in support of this view are the earlier cases in Massachusetts and Wisconsin now overruled.

In *Day v. Clark*, 25 Vt. 402, the rule is

laid down that the record of the prior deed after the second is notice to a purchaser from the vendee in the second that there is such a prior deed, but the record of it is no notice that the vendee in the second deed, at the time he secured it, had notice of the first deed, and without such notice the title of the purchaser from the vendee in the second, but first recorded deed, would not be affected by the fraud or knowledge of his vendor.

The doctrine of the text is also supported by *English v. Waples*, 13 Iowa, 57 ; *Sims v. Hammond*, 33 Iowa, 368.

¹ See *Stanhope v. Earl Verney*, 2 Eden, 81.

² *Cook v. Travis*, 20 N. Y. 402 ; *Losey v. Simpson*, 3 Stockt. (N. J.) 246.

³ *Calder v. Chapman*, 52 Pa. St. 359 ; *Wing v. McDowell*, Walk. (Mich.) 175 ; *Farmers' Loan, &c. Co. v. Maltby*, 8 Paige (N. Y.), 361.

his search to the next succeeding link by which the claim is continued. When the purchaser has traced the title down to an individual, out of whom the record does not carry it, the registry acts make that title the purchaser's protection.¹

Yet, the circumstances may be such that a purchaser will be bound to search the records for incumbrances as against a title which does not appear upon the records; as for instance when he has actual notice of the existence of a mortgageable estate in one prior to the date of his title to an absolute fee. One in possession of land under a contract of sale, though the contract be by parol, has a mortgageable interest, and a mortgage of it may be legally and properly recorded, so as to take precedence of a subsequent conveyance of the property, if the subsequent purchaser had actual notice of the existence of a mortgageable estate in the mortgagor prior to his receiving an absolute deed of the land.²

A recital in a deed that the grantee had been in possession of the granted farm since a given date, several months prior to the deed, under a contract for the purchase of it, is actual notice to one claiming under the title of such deed, that the grantee had been in possession before he received a deed of the land, and the law charges him with notice that such grantee had, during such possession, a mortgageable interest in the land; and he is bound to search the records for incumbrances against the title from the time the grantee entered into possession under his contract, and he is bound by a mortgage made by such grantee while in possession under the contract of sale and before receiving a deed.³

577. Notice of a secret trust.—It is frequently the case that an estate which appears by the record to be absolutely the prop-

¹ Per Chancellor Williamson, in *Losey v. Simpson*, 11 N. J. Eq. (3 Stock.) 246; and see *Cook v. Travis*, 20 N. Y. 402; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 398.

² *Crane v. Turner*, 7 Hun (N. Y.), 357.

³ *Crane v. Turner*, 7 Hun (N. Y.), 357. Mr. Justice Follett by way of illustration, said: "If, January first, a grantee receives a deed and enters into possession, but neglects to record the deed, or it is destroyed, and subsequently he receives a new deed bearing a later date and reciting

that it is confirmatory of a deed dated January first, under which he has been in possession since that date, and which deed has been lost, it would not be held that a search back to the date of the confirmatory deed was due diligence in a person who had actual notice of the recital, even though accompanied by inquiry of the grantee; and if he should take a mortgage and record it, it would not have precedence over a duly recorded mortgage given between the dates of the first and second deeds.

erty of the grantee, is in fact held by him in trust for another person. In such case, any one who deals with him in respect to this estate, with knowledge of the trust, takes it subject to the trust. If the conveyance, though absolute in form, be in fact a mortgage, a purchaser, with knowledge of this fact, takes the estate subject to the mortgage. "Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust."¹

2. *Actual Notice.*

578. There are three kinds of notice; actual, implied, and constructive. As the doctrine of notice as affecting the priority of incumbrances arises from the equitable view that it is fraud in one, who has notice of an adverse claim in another, to attempt to acquire a title to the prejudice of the interest of which he has been made aware, it is obvious that the actual culpability involved by the notice must depend altogether upon the kind and degree of notice received. Yet, the legal consequences are the same, whatever the kind and degree of the notice may be, provided the notice is imputed at all.

579. *Actual notice*, of course, means direct personal knowledge.² Whether it exists in any particular case, and whether it is sufficient to charge the party whom it is sought to affect by it, is a question of fact to be considered and determined upon the evidence in each particular case. It is deemed effectual and suffi-

¹ *Saunders v. Dehew*, 2 Vern. 271.

² *Rogers v. Jones*, 8 N. H. 264; *Williamson v. Brown*, 15 N. Y. 354; *Mayor, &c. of Baltimore v. Williams*, 6 Md. 235.

The statutes of Massachusetts provide that no unrecorded deed shall be valid, save as against the grantors and persons having "actual notice thereof." By actual notice is not meant necessarily that a person must actually have seen or been told of the deed by the grantor, but it means any intelligible information of it,

either verbal or in writing, coming from a source which a party ought to give heed to. *Curtis v. Mundy*, 3 Met. (Mass.) 405; *George v. Kent*, 7 Allen (Mass.), 16. This provision was first adopted in the Rev. Stat. of 1836, before which time implied or constructive notice was held to be sufficient, but now has no effect. *Parker v. Osgood*, 3 Allen (Mass.), 487; and see *Lawrence v. Stratton*, 6 Cush. (Mass.) 163, 166.

cient when the evidence shows that the matters relating to the prior claim or interest of another, constituting notice of it, are brought distinctly to the knowledge and attention of the person it is sought to affect.¹

Actual notice may be verbal or written;² it may be intended or accidental;³ it may affect an infant or *feme covert* as much as an adult;⁴ *a cestui que trust* is bound by notice to the trustee;⁵ notice to one of several partners is notice to the partnership;⁶ and notice to one of several trustees is generally sufficient.⁷

580. The degrees and kinds of actual notice are of course without number, ranging from a formal written statement of the lien, giving all its details, to a mere verbal declaration of the fact of its existence; it may be one given expressly as a notice, or it may have come in an accidental way. But neither the manner of the notice nor the purpose of it is material.⁸ The degree of the notice, however, is material. "Flying reports are many times fables and not truth."⁹ A mere rumor that some other person claims an interest in the property will not affect a person with notice of such interest.¹⁰ Generally, such notice, to be binding, must proceed from some person interested in the property.¹¹ This latter proposition has, however, been questioned; and it is said that if the information be derived from any other source entitled to credit, and it be definite, it will be equally binding as if it came from the party himself.¹²

Notice of an intention on the part of the owner of property to execute a lien upon it does not prevent the person having such notice from taking a valid incumbrance upon it.

¹ Robinson's Law of Priority, p. 27.

² North Brit. Ins. Co. v. Hallett, 7 Jur. (N. S.) 1263.

³ Smith v. Smith, 2 Crompt. & M. 231.

⁴ Fisher on Mort. 3d ed. p. 548.

⁵ Wise v. Wise, 2 Jones & Lat. 403.

⁶ Travis v. Milne, 9 Hare, 141.

⁷ Meux v. Bell, 1 Hare, 73.

⁸ Smith v. Smith, 2 Crompt. & M. 231; North Brit. Ins. Co. v. Hallett, 7 Jur. N. S. 1263.

⁹ Wildgoose v. Wayland, Gouldsb. 147, pl. 67, per Lord Keeper Egerton; and see Butler v. Steevens, 26 Me. 484; Doyle v. Teas, 4 Scam. (Ill.) 202.

¹⁰ Jolland v. Stainbridge, 3 Ves. 478;

Jaques v. Weeks, 7 Watts (Pa.), 267;

Wilson v. McCullough, 11 Harris (Pa.),

440.

¹¹ Natal Land Co. v. Good, 2 L. R. P.

C. 121; Barnhart v. Greenshields, 9 Moore

P. C. 18, 36; Rogers v. Haskings, 14

Ga. 166; Lamont v. Stimson, 5 Wis. 443;

Van Dwyne v. Vreeland, 1 Beas. (N. J.)

142, 155; Peebles v. Reading, 8 S. & R.

496.

¹² Mulliken v. Graham, 22 P. F. Smith

(Pa.), 484, 490; Curtis v. Mundy, 3 Met.

(Mass.) 407.

A creditor may by his vigilance secure his demand, if possible, by taking a mortgage from his debtor, just as he might by an attachment, although he knew that another creditor intended to make an attachment in the one case, or to take a mortgage in the other, and had taken steps for effecting this.¹

The burden of proof is upon the person who claims priority, and charges another with notice of his own incumbrance to make out affirmatively that the other had such notice.²

Notice to supply the place of registry must be more than what is barely sufficient to put the party upon inquiry.³ To break in upon the registry acts, it must be such as will, with the attending circumstances, affect the party with fraud.⁴ The notice must be clear and undoubted;⁵ and when that is the case it is regarded as *per se* evidence of fraud for one to attempt to defeat a prior incumbrance by setting up a subsequent deed.⁶ It is sufficient if it comes within the rule, *Id certum est, quod certum reddi potest*. The facts disclosed amount to notice when they are such as *render it incumbent* on the purchaser or mortgagee to inquire, and at the same time enable him to prosecute the inquiry successfully.⁷ If in such case he wilfully closes his eyes and remains ignorant of facts he would ascertain by a reasonable inquiry, he is affected with notice of them just as much as he would be had he made the inquiry.⁸

581. Notice has effect if received any time before completion of trade. — A subsequent purchaser is bound by notice of a prior unrecorded mortgage, although not received till after he has agreed upon the terms of the trade, if received before he has

¹ Warden *v.* Adams, 15 Mass. 233.

² Hardy, Exp. 2 D. & C. 393; Fort *v.* Burch, 6 Barb. N. Y. 78; Center *v.* Planters' & Merchants' Bank, 22 Ala. 743; McCormick *v.* Leonard, 38 Iowa, 272; Miles *v.* Blanton, 3 Dana (Ky.), 525; Van Wagenen *v.* Hopper, 8 N. J. Eq. (4 Halst.) 684, 707.

³ Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Williamson *v.* Brown, 15 N. Y. 354, and cases cited; Reed *v.* Gannon, 50 N. Y. 345; and see Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211.

⁴ Dey *v.* Dunham, 2 Johns. (N. Y.) Ch.

182; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457.

⁵ Hine *v.* Dodd, 2 Atk. 275; West *v.* Reid, 2 Hare, 249.

⁶ Dunham *v.* Dey, 15 Johns. (N. Y.) 555.

⁷ Spofford *v.* Weston, 29 Me. 140; Parker *v.* Kane, 4 Wis. 1; Nute *v.* Nute, 41 N. H. 60.

⁸ Blaisdell *v.* Stevens, 16 Vt. 186; Bunting *v.* Ricks, 2 Dev. & Bat. (N. C.) Ch. 130; and see White & Tndor's Lead. Cas. 4th Am. ed. vol. 2d, pt. 1, pp. 152-155.

actually paid the consideration, or in any way put himself to disadvantage by a partial completion of the transaction.¹ But after the sale is completed by the payment of the consideration, notice of a prior mortgage is without effect.²

Lord Hardwicke is reported to have held that a purchaser having notice of a prior interest after payment of the purchase money, but before conveyance, is not entitled to protection, for the reason that some suspicion arises from his not taking the legal estate at the time when the money is paid.³ But the decision is at variance with all other cases on this point; and the law at the present day upon the subject is undoubtedly expressed in the dictum of Lord Thurlow, that "the time when the money was advanced is that at which the notice is material."⁴ And in the later saying of Lord Hatherley, that "in itself it is immaterial whether the purchaser knows or not that another had an equitable interest prior to his own, provided he did not know that fact on paying his purchase money."⁵

A mortgagee cannot escape the effect of a notice he has received of a previous lien by having forgotten it at the time he took the mortgage.⁶

582. Limitation that one with notice may acquire a good title from one without notice.—The rule, that one purchasing or taking a mortgage of property with notice of some prior adverse claim to, or interest in, such property takes subject to such interest, is subject to the limitation that if a person with such notice acquires a legal title to the property from one who is without such notice, he is entitled to the same protection as his vendor, "as otherwise it would very much clog the sale of estates."⁷ Therefore, if a person takes a mortgage or other conveyance with notice of a prior incumbrance, but takes it from one who

¹ *Beckett v. Cordley*, 1 Bro. C. C. 353; *English v. Waples*, 13 Iowa, 57.

² *Syer v. Bundy*, 9 La. Ann. 540.

³ *Hardingham v. Nicholls*, 3 Atk. 304; *Wigg v. Wigg*, 1 Atk. 382; and see *Mackreth v. Symmons*, 15 Ves. 335, per Sir S. Romilly; 2 Dart Vend. & P. 4th ed. 760; *Rayne v. Baker*, 1 Giff. 241.

⁴ *Beckett v. Cordley*, *supra*.

⁵ *Pilcher v. Rawlins*, L. R. 7 Chan. App. 259.

⁶ *Hunt v. Clark*, 6 Dana (Ky.), 56.

⁷ *Lowther v. Carlton*, 2 Atk. 242; *Brandlyn v. Ord*, 1 Atk. 571; *Harrison v. Forth*, Prec. Ch. 51; *Sweet v. Southcote*, 2 Bro. Ch. 66; *Cook v. Travis*, 22 Barb. (N. Y.) 338; 20 N. Y. 400; *Varick v. Briggs*, 6 Paige (N. Y.), 323; *Bell v. Twilight*, 18 N. H. 159; *Boynton v. Rees*, 8 Pick. (Mass.) 329.

purchased without such notice, and therefore acquired a title good against such incumbrance, such subsequent mortgagee with notice may shelter himself under the protection which the law affords his grantor; he takes the latter's rights.¹

One who takes a second mortgage, with notice of a prior unrecorded mortgage, is not the less a purchaser with notice, and subject to such mortgage, because he is at the same time informed that the debt secured by such mortgage is usurious.²

A judgment creditor who has notice of an unrecorded mortgage holds his lien subject to the mortgage.³

It is no defence to one who takes a deed of land with actual knowledge on his part of a previous mortgage upon it, that the parties to the mortgage agreed that it should not be recorded, and the mortgagee received a written guaranty "to hold him harmless from any loss by reason of not recording the deeds."⁴

583. Limitation that one without notice may acquire a good title from one who has notice.—Another limitation to the rule of notice arises when a person in good faith acquires a legal title from one who has notice of a prior equitable right.⁵ The last purchaser's "own *bona fides* is a good defence, and the *mala fides* of his vendor ought not to invalidate it." Therefore, although one who has notice of a prior unrecorded mortgage cannot himself purchase the land, or take a mortgage upon it, without its being subject to such unrecorded mortgage, yet if he sell the land or the mortgage to a purchaser in good faith before the record of the prior mortgage, the purchaser from him will acquire a title superior to the unrecorded mortgage; but should such purchaser omit to record his deed or assignment until the mortgage is recorded, he would stand in no better position than his assignor.⁶

In like manner an attaching creditor without notice of an un-

¹ *Harrington v. Allen*, 48 Miss. 492; *Chance v. McWhorter*, 26 Ga. 315.

² *Beverley v. Brooke*, 2 Leigh (Va.), 425.

³ See § 461; *Williams v. Tatnall*, 29 Ill. 553; *Thomas v. Vanliu*, 28 Cal. 616; but see *Smith v. Jordan*, 25 Ga. 687.

⁴ *Lord v. Doyle*, 1 Cliff. 453.

⁵ *Mertins v. Jolliffe*, Amb. 313; and see, also, *Att'y Gen. v. Wilkins*, 17 Beav. 293; *Harrison v. Forth*, Prec. Ch. 51; *M'Queen v. Farquhar*, 11 Ves. 467, 478.

⁶ *Fort v. Burch*, 5 Denio (N. Y.), 187; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260. See *Strond v. Lockhart*, 4 Dall. 153; *Harrington v. Allen*, 48 Miss. 492.

recorded deed will hold the estate, although the debtor had notice of it.¹

3. *Implied Notice.*

584. Notice to principal implied from notice to agent. — When an agent acquires a knowledge of any matters or instruments affecting the title of any lands, about the purchase or mortgage of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal; or, in other words, notice to the principal of such matters or instruments is implied.² Such notice is sometimes called constructive; but it is really implied from the identity of principal and agent, and not imputed by virtue of a construction placed upon their conduct or relation:

Notice to an agent, to bind the principal, must be brought home to the agent while engaged in the business and negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter.³ The knowledge or notice of facts acquired by an attorney, while engaged in the business of his client, is knowledge or notice of them by the client himself.⁴

Where a solicitor induced a client to take a mortgage upon the lands of a third person, situate in the county of Middlesex, in England, and soon afterwards induced a second client to advance money on mortgage of the same lands, without informing him of the existence of the first mortgage, and the second mortgage was registered before the first mortgage was registered, it was held that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority.⁵ Lord Chancellor Hathery said: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Man-kind would not be safe if it were held that, under such circum-

¹ Coffin v. Ray, 1 Met. (Mass.) 212.

16 How. (N. Y.) Pr. 119; Fry v. Shehee, 55 Ga. 208.

² Fuller v. Bennett, 2 Hare, 394, and cases cited; Williamson v. Brown, 15 N. Y. 359; Hovey v. Blanchard, 13 N. H. 145; Bank of U. S. v. Davis, 2 Hill (N. Y.), 451.

⁴ Jones v. Bamford, 21 Iowa, 217; Jackson v. Van Valkenburgh, 8 Cow. (N. Y.) 260.

⁵ Rolland v. Hart, L. R. 6 Ch. App.

³ Pringle v. Dunn, 37 Wis. 449; May v. Borel, 12 Cal. 91; Haywood v. Shaw, 678.

stances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance, because he was not told of it by his solicitor."

585. Upon what principle this implied notice rests. — "It is a moot point," says Vice-Chancellor Kindersley,¹ "upon what principle this doctrine rests. It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual notice on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego* — he is myself; I stand in precisely the same position as he does in the transaction, and, therefore, his knowledge is my knowledge; and it would be a monstrous injustice, that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable."

"In such a case," said Lord Chancellor Brougham,² "it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

586. The notice must be in the same transaction. — Notice to the agent binds the principal only when it is given to or acquired by him in the transaction in which the principal employs him.³ The reason for this limitation has been stated to be, that

¹ *Boursot v. Savage*, L. R. 2. Eq. 142.

² *Kennedy v. Green*, 3 M. & K. 699, 719.

³ *Warrick v. Warrick*, 3 Atk. 294, per Lord Hardwicke; *Fitzgerald v. Fanconberg*, 9 Fitz G. 207; *Fuller v. Bennett*, 2 Hare, 404; *New York Ins. Co. v. National Ins. Co.* 20 Barb. (N. Y.) 468; and see *White & Tudor's Lead. Cas.* in Eq. 4th Am. ed. vol. 2d, pt. 1, pp. 170, 173, and see *Rolland v. Hart*, L. R. 6 Ch. App. 678.

"It is settled," says Lord Hardwicke, in *Warrick v. Warrick*, *supra*, "that notice to the agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards. It would be very mischievous if it was so; for the man of most practice and greatest eminence would then be the most dangerous to employ."

an agent cannot stand in the place of the principal until the relation is constituted; and that as to all the information which he has previously acquired, the principal is a mere stranger.¹ Another explanation commonly made of the rule is that the agent may have forgotten the former transaction. Under this latter view of the doctrine, the criticism of Lord Eldon² might well be regarded as shaking it; but it is suggested in later cases that it was not the purpose of his dictum to question the general doctrine itself. At any rate this has been insisted upon ever since his time, and may be regarded as settled.³

When the agent or attorney is employed by a person in several mortgage transactions, and he acts for the mortgagees also, in all of them, although the transactions are distinct, the later mortgagees are said to be affected with notice of the earlier mortgages; on the ground that the transactions follow each other so closely that they amount to a continuous dealing with the same title.⁴ This exception would remain good only when the mortgagor was the same in all the transactions and the same attorney is employed in all.

587. The notice must be of some matter material to the transaction; of some thing which it is the duty of the agent to make known to the principal.⁵ If the agent acts merely in a ministerial capacity, as for instance in obtaining the execution of a deed, the principal is not affected with the agent's knowledge.⁶ In like manner, a mortgagor to whom a mortgage is intrusted for record is not such an agent of the mortgagee, that notice to him of an incumbrance, or his knowledge of it, is constructive

¹ *Mountford v. Scott*, 3 Madd. 40; and see *Fuller v. Bennett*, 2 Hare, 394, per Sir J. Wigram.

² When the case of *Mountford v. Scott* was on appeal before Lord Eldon, L. C. (T. & R. 274) he remarked that "it might fail to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in

a court of equity to have forgotten it in the evening." And see *Hargreaves v. Rothwell*, 1 Keen, 154; *Brotherton v. Hatt*, 2 Vern. 574.

³ *Fuller v. Bennett*, *supra*.

⁴ *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, 1 Keen, 154; *Winter v. Lord Anson*, 1 S. & St. 434; 3 Russ. 493; and see *Distilled Spirits*, 11 Wall. 356.

⁵ *Wyllie v. Pollen*, 32 L. J. (N. S.) Ch. 783.

⁶ *Wyllie v. Pollen*, *supra*.

notice to the mortgagee.¹ As pointed out by Lord Westbury,² a solicitor whose notice affects his client must be a solicitor "for the confidential purpose of advising," otherwise there is no duty on his part to communicate the knowledge to the client, and the doctrine of implied notice has no application.

Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment is notice to the plaintiff, and is equivalent to a record in protecting it against the attachment.³ But such knowledge on the part of an attorney who makes the writ, but has no agency in procuring the attachment, has been held not to affect the plaintiff.⁴

588. When the same agent or attorney is employed by both parties in the same transaction, his knowledge is then the knowledge of both the vendor and vendee, of both the mortgagor and mortgagee.⁵ In such case, moreover, the rule that the agent's notice must be in the same transaction is less strictly adhered to.⁶ Thus, where a person made two successive mortgages of the same property, and then gave a further charge to the first mortgagee, and the same solicitor was employed in all three transactions, it was held that the first mortgagee had implied notice of the second mortgagee's incumbrance, and that the latter was entitled to priority over the further charge to the first mortgagee.⁷

589. Exception when the agent is a party. — The rule, that the knowledge of the attorney is the knowledge of the client, has no application when the attorney himself is the borrower. Therefore, where one was attorney for two persons, and executed to one of them a mortgage, which was not recorded, and afterwards executed another mortgage of the same premises to the other, and this mortgage was recorded, it was held that the priority of this mortgage was not affected by the attorney's knowledge of the mortgage first executed.⁸ Whenever the agent is

¹ *Anketel v. Converse*, 17 Ohio St. 11; *Hoppock v. Johnson*, 14 Wis. 303.

² In *Wyllie v. Pollen*, *supra*.

³ *Tucker v. Tilton*, 55 N. H. 223.

⁴ *Tucker v. Tilton*, *supra*.

⁵ *Loscy v. Simpson*, 11 N. J. Eq. (3 Stock.) 246. See *Astor v. Wells*, 4 Wheat. 466.

⁶ *Fuller v. Bennett*, 2 Hare, 403; *Brotherton v. Hatt*, 2 Vern. 574.

⁷ *Hargreaves v. Rothwell*, 1 Keen, 154.

⁸ *Hope F. Ins. Co. v. Cambrelling*, 1 Hun (N. Y.), 493. And see *Rolland v. Hart*, L. R. 6 Ch. App. 678, 683, per Lord Hatherley; *Kennedy v. Green*, 3 Mylne & K. 699; *McCormick v. Wheeler*, 36 Ill.

“the contriver, the actor, and the gainer of the transaction,” the reason for charging the principal with notice of the facts no longer exists.¹

In like manner, when the agent is guilty of any fraud, for the carrying out of which it is necessary that he should conceal it from his principal, notice of it cannot be imputed to the latter.² “It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client, in order to defraud him.”³ The fraud must exist independently of the question whether the act was communicated to the principal or not.⁴

590. Director of a corporation. — A corporation taking a mortgage of land is not chargeable with constructive notice of a prior conveyance of it by the mortgagor, because the latter was, at the date of the deed and of the mortgage, a director of the company, for in such a transaction the mortgagor deals with the company as a third party on his own behalf, acting for himself with and against the company, and not for it.⁵

4. *Constructive Notice.*

591. In general. — Constructive notice is that which is imputed to a person of matters which he necessarily either knows or ought to know, or which, by the exercise of ordinary diligence, he might know. It cannot be controverted.⁶ The most familiar

114; *Winchester v. Susquehanna R. Co.* 4 Md. 231.

¹ *Kennedy v. Green, supra.*

² *Kennedy v. Green, supra*; and see *Re European Bank*, L. R. 5 Ch. App. 358; *Fulton Bank v. N. Y. & Canal Co.* 4 Paige (N. Y.), 127.

³ *Rolland v. Hart*, L. R. 6 Ch. App. 682.

⁴ *Atterbury v. Wallis*, 8 De G., M. & G. 466; and see *Sharpe v. Foy*, L. R. 4 Ch. App. 35; *Hewitt v. Loosemore*, 9 Hare, 455.

⁵ *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54, 61. “If his position as a director,” says Mr. Justice Emott, “could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with con-

structive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it could not be so when he did not become concerned as their special agent, or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them.”

⁶ *Plumb v. Fluit*, 2 Anst. 432, 438, per Eyre, C. B.; and see *Kennedy v. Green*, 3 My. & K. 719; *Hewitt v. Loosemore*, 9 Hare, 449; *Griffith v. Griffith*, 1 Hoff. (N. Y.) 153; *Weilder v. Farmers' Bank*, 11 S. & R. (Pa.) 134.

instance of constructive notice is that which under the registry laws is afforded by the record of a deed. Every subsequent inquirer is bound to know the existence and contents of such deed. But there are various other kinds of constructive notice, and a purchaser or mortgagee is as much bound by the knowledge thus imputed to him of matters and instruments affecting the title to property, as he would be if he were informed of them by a deed properly recorded. Whether the person charged with such notice actually had knowledge of the facts affecting the property in question, or might have learned them by inquiry, or whether he studiously abstained from inquiry for the very purpose of avoiding notice, he is alike presumed to have had notice.¹

592. Constructive notice is imputed either upon the ground of fraud or of negligence. — It does not exist without one or the other. “If there is not actual notice that the property is in some way affected,” says Vice-Chancellor Wigram,² “and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to a purchaser, there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a *bonâ fide* purchaser without notice.” In another case, Vice-Chancellor Turner said:³ “When this court is called upon to postpone a legal mortgage, its powers are invoked to take away a legal right, and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which in the eye of this court amounts to fraud.”

593. Notice of the existence of the lien without the particulars of it is sufficient.— One who has knowledge of a prior unrecorded mortgage upon some portion of the premises of which he is about to purchase a part is bound by such knowledge to ascertain the extent of that mortgage, and whether it covers the portion of the property he is about to acquire an interest in, and

¹ Whitbread v. Jordan, 1 Y. & C. Exch. 328; Jones v. Smith, 1 Hare, 55; Bisco v. Earl of Banbury, 1 Ch. Ca. 291; Ware v. Lord Egmont, 4 De G. M. & G. 473; and see cases collected in White & Tudor's Lead. Cas. 4th Am. ed. vol. 2, p. 121.

² Jones v. Smith, 1 Hare, 55; affirmed on Appeal, 1 Ph. 244.

³ Hewitt v. Loosemore, 9 Hare, 458.

he will be postponed to such prior mortgage, even if this proves to be an incumbrance upon the whole property.¹ Having notice of its existence he is chargeable with notice of all its contents.²

One having notice that an estate is incumbered is not justified in assuming that the incumbrance is one already known to him; he is bound to inquire into the nature and extent of the charge referred to.³ A notice of a lease is notice of all the covenants and provisions contained in it.⁴

594. Notice from recitals in deeds.—When a person claims under a deed which by its recitals leads him to other facts affecting the title to the property, he is presumed to know such facts; for it would be gross negligence in him not to make inquiry as to the facts he is thus put in the way of ascertaining.⁵ A recital or description in a deed, to have this effect, must be in the course of the title under which the purchaser claims.⁶ It must be sufficiently clear to put the purchaser upon inquiry, and to lead him to the requisite information. If the recital does not explain itself, it must refer to some deed or fact which will explain it, to make it constructive notice.⁷

A description of a portion of the land described in a deed, as “land, the title to which is in A., given as collateral security to pay certain notes,” is sufficient notice to the purchaser of an unrecorded mortgage to A. to preserve the priority of the mortgage.⁸

595. Recital that premises are subject to a mortgage.—One who purchases land by a deed, which expressly recites that the premises are subject to a mortgage, has notice of the mort-

¹ White & Tudor's Lead. Cas. in Eq. 4th Am. ed. vol. 2, pt. 1, 190; Willink v. Morris Canal & Banking Co. 4 N. J. Eq. (3 Green) 377; and see Hall v. Smith, 14 Ves. 425; Guion v. Knapp, 6 Paige (N. Y.), 35.

² George v. Kent, 7 Allen (Mass.), 16; Pike v. Goodwin, 12 Ib. 472, 474; Barr v. Kinard, 4 Strobb. (S. C.) 73.

³ Jones v. Williams, 24 Beav. 47.

⁴ Taylor v. Stibbert, 2 Ves. Jun. 437.

⁵ Bacon v. Bacon, Tothill, 133; Moore v. Bennett, 2 Ch. Ca. 246.

⁶ Boggs v. Varner, 6 W. & S. (Pa.) 469.

⁷ White v. Carpenter, 2 Paige (N. Y.), 217. In Sanborn v. Robinson, 54 N. H. 239, at the close of the description in a mortgage, the following words were enclosed in parenthesis:—

(Of six hundred dollars said premises are subject to a former

It was held that this was notice of a prior mortgage of that amount.

⁸ Dunham v. Dey, 15 Johns. (N. Y.) 556.

gage from the recital, and cannot claim against it, although it be not recorded.¹ In like manner, and for stronger reasons, one who has purchased land subject to a mortgage, which he agrees to pay, takes a title subject to the mortgage, although it be not recorded, or be recorded in such a way that it is not notice.²

In Ohio, where the statute is such that a mortgage takes effect only from its delivery for record, and its priority is not affected by notice of a prior unrecorded mortgage, of course the mere mention of a prior mortgage in the deed, as for instance excepting it from the covenants of warranty,³ does not affect the priority given by the record; yet, if the mortgage be expressly made subject to another, priority of record will avail nothing.⁴ Moreover, one taking a mortgage made expressly subject to a prior mortgage cannot avoid it and acquire a larger lien than contracted for, although that mortgage be invalid as against the mortgagor.⁵ When a mortgage is expressly excepted from a covenant of warranty in a deed this exception charges the purchaser with notice of the mortgage, although the mortgage be not recorded.⁶

It is a general rule, as elsewhere shown, that when the mortgaged premises have been sold in parcels to different persons at different times, in the absence of any intervening equities, the several parcels are subject to the mortgage, and are to be resorted to in the inverse order of alienation.⁷

When, however, the first purchaser expressly takes subject to the mortgage, he has, of course, no equity as against the mortgagor that the portion still held by the latter shall be first applied to the payment of the incumbrance; and having no equity against him, he has none against his grantee. By taking such a deed he consents that the land shall remain subject to its *pro rata* share of the debt.⁸

A purchaser having actual notice of a mortgage is affected not only with the incumbrance of such mortgage, but with any other incumbrances which are referred to in that mortgage, or in other

¹ Garrett v. Puckett, 15 Ind. 485; George v. Kent, 7 Allen (Mass.), 16; Howard v. Chase, 104 Mass. 249.

² Ross v. Worthington, 11 Minn. 438.

³ Bercaw v. Cockerill, 20 Ohio St. 163.

⁴ Coe v. Col., Piqua & Ind. R. Co. 10 Ohio St. 372, 406.

⁵ Hardin v. Hyde, 40 Barb. (N. Y.) 435; Freeman v. Auld, 44 N. Y. 50, reversing S. C. 44 Barb. 14; 37 Barb. 587.

⁶ Morrison v. Morrison, 38 Iowa, 73.

⁷ Iglehart v. Crane, 42 Ill. 261; McKinney v. Miller, 19 Mich. 142.

⁸ Briscoe v. Power, 47 Ill. 447.

deeds to which the deeds first referred to may in turn refer.¹ Having notice of the mortgage the purchaser is bound to know the contents of it, and that would lead him to other deeds, in which, pursued from one to another, the whole case must have been discovered to him.² Though the contents of a deed be stated to a purchaser, and he relies upon such statement, and the statement be erroneous, he is bound by its real contents;³ and in like manner, if he has knowledge of an unrecorded mortgage, and rests upon the vendor's assurance that the debt secured by it has been satisfied, he does so at his peril.⁴

596. What is sufficient notice of an incumbrance to put mortgagee upon inquiry.—The fact that a mortgage, duly recorded, names a sum of \$500 in addition to a note secured, is sufficient to put a subsequent purchaser upon inquiry. A party wilfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence.⁵

In like manner, where a mortgage secured several notes, but in the record the description of one of them was omitted, but the aggregate amount of the notes was given correctly, it was held that the mortgage was notice to a purchaser for the full amount of the mortgage notes.⁶ When a deed was made subject to "two mortgages for \$2,000," with warranty against all claims, "except said mortgages,"—and there were two prior mortgages, one for \$1,500, which was recorded, and of which the purchaser had actual knowledge, and one of \$2,000, which was not recorded, and of which he had no notice except such as was given by the deed, it was held that the recitals in the deed were sufficient to put him upon inquiry and to charge him with actual knowledge of the unrecorded mortgage.⁷

¹ *Bisco v. Earl of Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hope v. Liddell*, 21 Beav. 183; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Green v. Slayter*, 4 Johns. (N. Y.) Ch. 38. See *Cambridge Valley Bank v. Delano*, 48 N. Y. 327.

² *Bisco v. Earl of Banbury*, *supra*, per Lord Chancellor.

³ *Jones v. Smith*, 1 Hare, 43; on appeal affirmed, 1 Ph. 244, and cases cited. But see *Drysdale v. Mace*, 2 Sm. & G. 225; 5 De G., M. & G. 103.

⁴ *Price v. McDonald*, 1 Md. 403; *Hudson v. Warner*, 2 Harris & G. (Md.) 415.

⁵ *Babcock v. Lisk*, 57 Ill. 327.

⁶ *Dargin v. Becker*, 10 Iowa, 571.

⁷ *Hamilton v. Nutt*, 34 Conn. 501.

597. Does a conveyance of land to the mortgagee subject to a mortgage imply that he has assigned the mortgage. — It has already been noticed that a deed conveying land subject to a certain mortgage, or warranting it against all incumbrances except the mortgage, is notice to all persons claiming under such deed of the existence of the mortgage. If such a deed of the equity of redemption be made to the mortgagee himself, it is a question of fact for a jury whether such recital or warranty implies that the mortgage is not then held by the mortgagee, or is notice to his attaching creditors that the mortgage has been assigned to another.¹

The record of a purchase money mortgage is not notice of the conveyance for which such mortgage was given, so as to invalidate the title of one who subsequently purchases of the vendor before the first deed given by him is recorded.²

598. One who takes merely a release of all the interest of the mortgagor, while an unrecorded mortgage made by him is outstanding, obtains only the mortgagor's equity of redemption subject to such mortgage.³

5. *Lis Pendens*.

599. The force and effect of the recording of a mortgage are limited not only by the actual notice which the mortgagee may have of prior unrecorded conveyances, but also by constructive notice of rights and claims of other parties, furnished by the pendency of an action in relation to the title of the mortgaged property, notice of the pendency of which has been filed according to law; as for instance the pendency of a suit to set aside the conveyance to the mortgagor as fraudulent.⁴ The doctrine of *lis pendens* is founded upon the consideration that no suit could be successfully terminated if, during its pendency, the property could be transferred so that it would not be bound by the decree or judgment in the hands of the assignee.

This doctrine of *lis pendens*, however, is not carried to the ex-

¹ Clark v. Jenkins, 5 Pick. (Mass.) 280.

² Pierce v. Taylor, 23 Me. 246; Losey v. Simpson, 11 N. J. Eq. (3 Stock.) 246; but it is notice of such deed to one claiming under the mortgage. Center v. P. & M. Bank, 22 Ala. 743.

³ Smith v. Mobile Bank, 21 Ala. 125.

⁴ Tyler v. Thomas, 25 Beav. 47; Worsley v. Earl of Scarborough, 3 Atk. 392; Bellamy v. Sabine, 1 De G. & J. 580; Ayrault v. Murphy, 54 N. Y. 203; Murray v. Ballou, 1 Johns. (N. Y.) Ch. 566; and see Mitchell v. Smith, 53 N. Y. 413; Center v. Planters' & Mechanics' Bank, 22

tent of making it constructive notice of a prior unregistered deed;¹ as for instance proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of the mortgaged property.

6. *How far Possession is Notice.*

600. Possession by one who is not the owner of record is a fact which should induce one proposing to purchase to inquire whether the possession is founded on any title. It is notice of the rights of the occupant, whatever they may be; and if he claim by deed, his possession is regarded by some authorities as equivalent to the recording of such deed.² If the mortgage be by an absolute deed, the defeasance of which is not recorded, the mortgagor's continued possession and occupation of the premises, within the knowledge of the grantees of the mortgagee, is held by some courts to be sufficient notice of the mortgagor's title;³ but by others his possession is not regarded as notice of the defeasance.⁴ In like manner it has been held that where land is conveyed, and at the same time mortgaged back for the security of the purchase money, and the grantor becoming the mortgagee continues in actual possession and occupation of the land, but neither the deed nor the mortgage is recorded, and the mortgagor in the mean time makes another mortgage of it to a third person, the mortgage for the purchase money is entitled to priority.⁵

Ala. 743; and see, also, cases collected in *White & Tudor's Lead. Cas.* in Eq. 4th Am. ed. vol. 2, pt. 1, p. 192 *et seq.*

¹ 1 Story's Eq. Jur. § 406; *Douglas v. McCrackin*, 52 Ga. 596; *Newman v. Chapman*, 2 Rand. (Va.) 93. In Alabama, on the contrary, such suit is notice from the time when service is perfected. *Hoole v. Atty. Gen.* 22 Ala. 190.

² *James v. Lichfield*, L. R. 9 Eq. 51; *Taylor v. Stibbert*, 2 Ves. Jun. 437; *Moreland v. Richardson*, 24 Beav. 33; *Wilson v. Hart*, 1 L. R. Ch. App. 467; *Trnesdale v. Ford*, 37 Ill. 213; *Brown v. Gaffney*, 28 Ill. 157; *Doyle v. Stevens*, 4 Mich. 87; *Farmer's Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.), 361; *Emmons v. Murray*, 16 N. H. 385; *White & Tudor's Lead. Cas.* in Eq. 4th Am. ed. vol. 2d, pt. 1, p. 180.

In Massachusetts, since the Rev. Stat.

of 1836, constructive notice of a prior unrecorded deed is not admissible; the notice to be effectual must be actual. Therefore open possession by one who has an unrecorded deed of land will not avail as notice of such deed, for it is not evidence of "actual notice." *Dooley v. Wolcott*, 4 Allen (Mass.), 406; *Pomroy v. Stevens*, 11 Met. (Mass.) 244. Proof of such fact may, however, be made in connection with evidence of actual notice. *Sibley v. Lefingwell*, 8 Allen (Mass.), 584; *Mara v. Pierce*, 9 Gray (Mass.), 306. Nor is the fact that land is assessed to one who holds an unrecorded deed actual notice of it. *Parker v. Osgood*, 3 Allen (Mass.), 487, 490.

³ *Daubenspeck v. Platt*, 22 Cal. 330.

⁴ *Crassen v. Swoveland*, 22 Ind. 427; *Newhall v. Pierce*, 5 Pick. (Mass.) 450.

⁵ *McKecknie v. Hoskins*, 23 Me. 230.

An actual possession of the premises, to operate as implied notice, must be visible and open, and not merely a constructive possession.¹

The continued possession of the mortgagor after the premises have been sold under a foreclosure against him is not deemed constructive notice of any subsequent title or interest he may have acquired which does not appear of record.² Due diligence on the part of the mortgagee in obtaining information after having been put upon inquiry is a test of good faith.³

But it is held that possession, to operate as notice, should be inconsistent with the title upon which the possessor relies. The owner and occupant of a house conveyed it in fee to a son; and taking back a lease for life, remained in possession. The son, before the lease was recorded, gave a mortgage on the property to one who made reasonable inquiries as to liens.⁴ It was held that the possession of the former owner under the lease was not such as to give the mortgagee notice of any rights in the premises.

Possession by a vendee under a contract of purchase, whether it be personal or by a tenant, is constructive notice of his equitable rights as purchaser, and any one taking a mortgage under such circumstances from his vendor takes subject to his rights.⁵

601. An equivocal, occasional, or temporary possession will not take the case out of the operation of the registry laws. The protection furnished by these laws should not be taken away except upon clear proof of a want of good faith in the party claiming their protection, and a clear right in him who seeks to establish notice by means of possession.⁶ The circumstances must be such that a prudent man would be put upon inquiry, and would be chargeable with bad faith if he did not inquire. "We would

¹ Webster v. Van Steenberg, 46 Barb. (N. Y.) Ch. 316; Braman v. Wilkinson, (N. Y.) 211; Tuttle v. Jackson, 6 Wend. 3 Barb. (N. Y.) 151.

² Dawson v. Danbury Bank, 15 Mich. 489; and see Cook v. Travis, 20 N. Y. 400.

³ Reed v. Gannon, 50 N. Y. 345, 350.

⁴ Staples v. Fenton, 5 Hun (N. Y.), 172. A like discussion on similar facts was made in Bell v. Twilight, 18 N. H. 159; but the same reasons were not assigned.

⁵ Bank of Orleans v. Flagg, 3 Barb.

⁶ Brown v. Volkening, N. Y. Ct. of Appeals, 2 N. Y. W. Dig. 86; Trustees of Union College v. Wheeler, 59 Barb. (N. Y.) 585; Bogue v. Williams, 48 Ill. 371; Butler v. Stevens, 26 Me. 484; White & Tudor's Real. Ca. in Eq. 4th Am. ed. vol. 2d, pt. 1, p. 185, and cases cited; Merritt v. Northern R. Co. 12 Barb. (N. Y.) 605.

observe," said Chief Justice Parsons, in an early case in Massachusetts,¹ "that the statute requiring the registry of conveyances being so very beneficial, and it being so easy to conform to it, when a prior conveyance not recorded until after one of a subsequent date is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved." The using of lands for pasturing, or for cutting timber, is not such an occupancy as will charge a purchaser with notice. The possession must be accompanied by improvement of the property to constitute notice.²

One purchasing or taking a mortgage of premises in the possession of a tenant is bound to inquire into the nature and extent of the tenant's interest, and is affected with notice of that interest whatever it may be.³ Such possession is also held to be notice of a collateral agreement held by the tenant for the purchase of the property.⁴

A husband and wife who had long occupied a farm, conveyed it to their son, and took back a mortgage conditioned for their support, but omitted to record it. They continued upon the farm; they and the son constituting one family, and all contributing to its support. Some years afterwards the son made a second mortgage, which was duly recorded; but the second mortgagee was regarded as having had notice of the legal title of the first mortgagees.⁵

If the owner of land conveys only a partial interest in it, as for instance the wood and timber growing upon it, and takes back a mortgage which is not recorded, his continued possession is not notice of his claim to the wood and timber, as against one who has purchased upon the faith of his bill of sale.⁶

Actual possession of land, by one who holds an unrecorded bond for a deed, is notice of his rights to one who takes a mortgage on the land from the vendor, and the mortgagee will take a lien only on the vendor's right.⁷ But the possession of a mort-

¹ *Norcross v. Widgery*, 2 Mass. 506.

⁴ *Knight v. Bowyer*, 23 Beav. 609, 641; *Taylor v. Sibbert*, 2 Ves. 437; *Kerr v. Day*, 14 Pa. St. 112.

² *M'Meehan v. Griffing*, 3 Pick. (Mass.) 149, and cases cited; *Holmes v. Stont*, 10 N. J. Eq. 419; *Trustees of Union College v. Wheeler*, 59 Barb. (N. Y.) 585, and cases cited.

⁵ *Boggs v. Anderson*, 50 Me. 161. See *Harrison v. N. J. R. & Transportation Co.* 19 N. J. Eq. 488.

³ *Cunningham v. Pattee*, 99 Mass. 248, 252.

⁶ *Patten v. Moore*, 32 N. H. 382.

⁷ *Doolittle v. Cook*, 75 Ill. 354.

gagee, whose mortgage is recorded, is not notice of his claim under an agreement to purchase the premises, although a rumor of his purchase was current in the neighborhood;¹ for in such case his possession is consistent with his record title, and it may well be taken for granted that he holds under the recorded title. Possession is notice only of the legal or equitable interest in the land of the person in possession. It visits the purchaser with notice of every fact and circumstance which he might have learned by making inquiry of the occupant, but it does not impose upon him the duty of searching the record in the name of such occupant to ascertain what title he has parted with.²

7. *Fraud as affecting Priority.*

602. Fraudulent concealment of incumbrance.— Another instance of constructive fraud arises when a person having a mortgage upon an estate conceals its existence, or so acts in relation to it as to induce another to purchase the estate, or to loan additional money upon it, in the belief that it is free from incumbrance. Whatever circumstances will amount to a fraudulent concealment or misrepresentation may depend in some measure upon the fact whether the prior mortgage is recorded or not; and, moreover, different considerations will control in cases of this sort, where a registry system is in full operation as it is in this country, from those that prevail in England, where the possession of the title deeds for the most part stands in place of registration. But whatever the circumstances may be, “the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”³

603. Inducing another to purchase the property as unincumbered.— A mortgagee may be so situated, that by allowing one whom he knows to be ignorant of the existence of his mort-

¹ *Plumer v. Robertson*, 6 Serg. & R. Sears, 6 Ad. & El. 474; and see *Peter v. (Pa.)* 179. Russell, 1 Eq. Ca. Abr. 322; *Savage v.*

² *Losey v. Simpson*, 11 N. J. Eq. (3 Stock.) 246. Foster, 9 Mod. 35; *Sharpe v. Foy*, L. R. 4 Ch. App. 35; *Berrisford v. Milward*, 2

³ Per Lord Denman, C. J., in *Pickard v. Atk.* 49.

gage to purchase the land and pay the full value of it without disclosing it, he will be precluded from setting it up against such purchaser; such for instance is the case of an attorney who acts for the mortgagor in drawing a deed for the conveyance of land from the mortgagor to a purchaser, but does not disclose a mortgage he himself holds upon the property, though he knows that the purchaser is buying it for its full value, in ignorance of the mortgage.¹

A mortgagee, however, whose mortgage is recorded, will not be so postponed merely because he knew that the mortgagor was making a subsequent conveyance of the premises, and did not make known his title; to have this effect, there must be actual and intentional fraud on his part;² or he must have done some act, or made some representation, to influence the conduct of another by inducing a belief of a given state of facts, when such party, having acted upon such belief, would be injured by showing a different state of facts. An *estoppel en pais* then arises against him. But he loses no right by neglecting to give a personal notice of his mortgage to one who is purchasing. The purchaser is presumed to know of the mortgage which has been duly recorded. He is bound at his peril to investigate the title.³

So, also, if a first mortgagee, having notice of a second mortgage, does anything to the prejudice of the latter; as for instance if he releases any part of the mortgaged premises without receiving payment of any part of his mortgage debt, he is, to the extent of injury done, postponed to the second mortgage.⁴

If a mortgagee represents to another person that the debt secured by the mortgage has been paid or satisfied, and that nothing is due on it, and thereby induces him to release other security and take a mortgage of the same land, the last mortgage, as between the two mortgagees, will take priority of the first, although the first was on record when such representation was made, as the person making the representation is estopped from disputing the truth of it with respect to the other who was thereby induced to alter his condition.⁵ And so if the first mortgagee in any way

¹ *L'Amoureux v. Vandenburg*, 7 Paige 65; and see *Marston v. Brackett*, 9 N. H. (N. Y.), 316; and see *Lee v. Munroe*, 7 336; and see *Story Eq. Juris.* § 391.
Cranch, 366, 368.

² *Paine v. French*, 4 Ohio, 318; *Brinkerhoff v. Lansing*, 4 Johns. (N. Y.) Ch.

³ *Rice v. Dewey*, 54 Barb. (N. Y.) 455.

⁴ *Bailey v. Gould*, Walk. (Mich.) 478.

⁵ *Pratt v. Squire*, 12 Met. (Mass.) 494;

combines with the mortgagor to induce another to loan money upon the estate, in ignorance of the first mortgage, this fraud will, without doubt, postpone his own mortgage.¹ And so if a second mortgagee stands by and sees the mortgagor induce the first mortgagee to release his mortgage, and take an assignment of another mortgage which he supposes to be next in priority to his own, but which is in fact, subsequent to the second mortgage, as against the second mortgagee, this subsequent mortgage will be preferred to his own.² When the holder of one of two mortgage deeds, executed on the same day, has represented to a person about to take an assignment of the other mortgage that the deeds were delivered at the same time, and that there was no priority in his deed, he is precluded from claiming a priority against such person.³

8. *Negligence as affecting Priority.*

604. Negligence is not fraud, though it may be evidence of it.⁴ — When a person having a mortgage upon an estate, or other interest in it, negligently puts it in the power of another to sell or mortgage the property to a third person, who is ignorant of such mortgage or interest, he cannot afterwards assert his own title in priority to the title of the party whom he has suffered to be deceived.⁵ By negligence is meant the want of that reasonable degree of diligence and care which a man of ordinary prudence and capacity would be expected to exercise in the same circumstances.

A person taking a mortgage or other conveyance of real estate is chargeable with notice of such facts as are indicated upon the face of the deeds, whether they indicate anything to him or not; for if he does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation, with

Fay v. Valentine, 12 Pick. (Mass.) 40; Hearne v. Rogers, 9 Barn. & Cres. 586; Miller v. Bingham, 29 Vt. 82; Chester v. Greer, 5 Humph. (Tenn.) 26.

¹ Peter v. Russell, 1 Eq. Ca. Abr. 322.

² Stafford v. Ballou, 17 Vt. 329.

³ Broome v. Beers, 6 Conn. 198.

⁴ Jones v. Smith, 1 Hare, 43; Worthington v. Morgan, 16 Sim. 547.

⁵ Briggs v. Jones, L. R. 10 Eq. 98; Robinson's Law of Priority, 54; Rice v. Rice, 2 Drew, 73; 1 Fisher on Mort. 3d ed. 550. In Briggs v. Jones, *supra*, Lord

Romilly thus stated the principle of this rule: A person who puts it in the power of another to deceive and raise money, must take the consequences. He cannot afterwards rely on a particular or a different equity." Most of the English cases upon this point relate to the matter of the delivery of title deeds; and therefore are for the most part of use in this country only as illustrating the general principle of the later cases. See Thorpe v. Holdsworth, L. R. 7 Eq. 139; Layard v. Maud, L. R. 4 Eq. 397.

respect to constructive notice, as he would have been had he employed a solicitor.¹

605. When a prior lien is extinguished, the lien next in order obtains priority. — It sometimes happens that a mortgagee, without intending to impair his own security, but through want of care in dealing with the mortgaged property, may lose his position of priority and find himself in the place of a subsequent mortgagee. Thus, a mortgagee knowingly and understandingly cancelled his mortgage when there was a second mortgage upon the property, and in lieu of the mortgage took an absolute conveyance of the property, in the absence of any fraud on the part of the holder of the second mortgage, the lien of the first mortgage will not be revived nor the second mortgagee prevented from reaping the benefit of the priority of his mortgage upon the records.² In like manner, where a senior mortgage was released without being paid, and at the same time a new mortgage was taken for the same sum, the question was whether a junior mortgage was thereby let into the position of priority. Although the transaction was a simultaneous one, and was not intended to impair the lien of the first mortgage, it was held that the release, which was absolute in terms, was a discharge of the lien, and the new mortgage was only a subordinate lien.³

But when a creditor to whom land has been conveyed in trust, to secure a debt, by a deed absolute in form reconveys it to his grantor, and simultaneously takes back a mortgage to secure the same debt, he does not lose his lien in equity as against a judgment rendered against the debtor subsequent to the original conveyance.⁴

606. Priority of lien between holders of several notes. — Where there are several notes secured by a mortgage, by some

¹ *Kennedy v. Green*, 3 M. & K. 699. The Master of the Rolls, referring to this case in *Greensdale v. Dare*, 20 Beav. 284, 291, said that the doctrine of this case requires to be administered with the greatest care and delicacy, and that probably that each case must stand upon the peculiar facts belonging to it.

² *Frazee v. Inslee*, 2 N. J. Eq. (1 Green) 239. The Chancellor said, that to revive

the mortgage in such case would be giving encouragement to negligence, and would destroy the value of a public record. And see *Smith v. Brackett*, 36 Barb. (N. Y.) 571; *Banta v. Garmo*, 1 Sandf. (N. Y.) Ch. 383.

³ *Woollen v. Hillen*, 9 Gill (Md.), 185. To the same effect, see *Neidig v. Whiteford*, 29 Md. 178.

⁴ *Christie v. Hale*, 46 Ill. 117.

authorities they are entitled to priority in payment according to the order of their maturity. If judgment is obtained on one of the notes, that takes the place of the note on which it was rendered.¹ The holder of the note first maturing may, upon default, or at any time afterwards, foreclose and sell the premises in satisfaction of his debt.² His delay to enforce his rights does not impair his prior right.³ But the mortgagee may by agreement give to particular notes a prior lien upon the security, irrespective of the time of their maturity; and therefore one who takes an assignment of a part of the notes secured by a mortgage should inquire of the maker and of the payee whether the others have been sold with a preferred lien upon the security. It is negligence on his part not to make such inquiry; and if the preferred lien has been given, it will be valid against such assignee.⁴ One holding a mortgage securing several promissory notes may assign part of the notes, and a corresponding interest in the mortgage, giving priority to the assignee, or a *pro rata* interest in the security, according to the terms of the assignment.⁵

A mortgage executed by one partner in the partnership name of real estate belonging to the firm, to secure a partnership debt, conveys the legal interest of such partner and the equitable interest of the co-partner; as when A. executed a mortgage in the firm name of A. & Bro., and himself acknowledged it. But a person taking a subsequent mortgage, properly executed by both partners, has priority as to the interest of the partner who did not execute the first mortgage.⁶ A mortgage by one tenant in common of his interest in partnership real estate, made for a valid consideration to one who has no notice of the partnership, is not subject to any equities arising out of the partnership relation of the grantor.⁷

Of two mortgages executed at the same time, to secure debts which mature at different times, if there be no other ground of priority, according to some authorities that is the prior lien which secures the payment of the note which first falls due. The rule is the same as it is when one mortgage secures debts maturing

¹ Funk v. McReynold, 33 Ill. 481.

⁵ Lane v. Davis, 14 Allen (Mass.), 225.

² Marine Bank v. International Bank, 9

Wis. 57; Wood v. Trask, 7 Wis. 566; Haynes v. Seachrest, 13 Iowa, 455. And see Brazleton v. Brazleton, 16 Iowa, 417.

³ Lyman v. Smith, 21 Wis. 674.

⁷ See §§ 119, 120; M'Dermot v. Laurence, 7 S. & R. (Pa.) 438.

⁴ Walker v. Dement, 42 Ill. 272.

at different times; they are to be paid in the order of their maturity.¹ It makes no difference in the order of payment, that after the assignment of the note first maturing to one person, the note next maturing is assigned to another with the mortgage or trust deed. The holding of the mortgage security gives no preference in order of payment.²

607. Priority between unrecorded mortgages. — As between several unrecorded mortgages or other conveyances, that of prior execution takes precedence.³ And so where several mortgages are executed and recorded at the same time, whether the parties intended that one of them should have priority is a matter of fact for the jury to determine from the evidence of such intention.⁴

608. Agreement fixing the priority of mortgages. — The parties may, as between themselves, make a valid agreement, though it be verbal only, that one of two mortgages shall be prior to the other, and the order of record is then immaterial unless they are subsequently assigned to other persons who have no notice of the agreement;⁵ although, according to some authorities, the want of notice on the part of the assignee makes no difference, but the mortgage continues subject to the equity of this arrangement.⁶ But such an agreement itself when in writing is not entitled to record, and therefore, if recorded, is not notice to subsequent purchasers.⁷

A mortgagee has an unquestionable right to waive his priority in favor of a subsequent mortgagee.⁸ But a mere admission

¹ *Isett v. Lucas*, 17 Iowa, 503; *United States Bank v. Covert*, 13 Ohio, 240; *Murdoek v. Ford*, 17 Ind. 52; *Harris v. Harlan*, 14 Ind. 439; *Marine Bank v. International Bank*, 9 Wis. 57. According to other authorities this circumstance is no evidence to determine the fact of priority. *Gilman v. Moody*, 43 N. H. 239.

² *Gwatineys v. Ragland*, Rand. (Va.) 466.

³ *Ely v. Scofield*, 35 Barb. (N. Y.) 330; *Berry v. Mut. Ins. Co.* 2 Johns. (N. Y.) Ch. 603.

⁴ *Gilman v. Moody*, 43 N. H. 239.

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⁵ *Jones v. Phelps*, 2 Barb. (N. Y.) Ch. 440; *Rhoades v. Cantfield*, 8 Paige (N. Y.), 545; *New York Chemical Manuf. Co. v. Peck*, 6 N. J. Eq. 37; *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618; S. C. 29 How. Pr. 263; *Sparks v. State Bank*, 7 Black. (Ind.) 469; *State Bank v. Campbell*, 2 Rich. (S. C.) Eq. 179.

⁶ *Conover v. Van Mater*, 18 N. J. 481; *Freeman v. Schroeder*, *supra*.

⁷ *Gillig v. Maass*, 28 N. Y. 191.

⁸ *Clason v. Shepherd*, 6 Wis. 369.

by one of two mortgagees, whose mortgages were executed, delivered, and recorded on the same day, that there is no priority of one mortgage over the other, although made by a writing signed by him, does not preclude his afterwards claiming a priority in time for his own mortgage, because such admission is like a parol declaration, subject to be explained or contradicted.¹ But such writing would be admissible in evidence to show that the deeds took effect simultaneously.²

Without any agreement, there may be facts and circumstances which will entitle one of two mortgages, recorded at the same time, to an equitable priority over the other;³ and on the other hand, although one mortgage may have been recorded before another, there may be facts which will entitle the two mortgages to stand upon an equality. An instance of the latter kind occurs when a trustee, having two funds, loans them to the same person, upon two distinct mortgages, without the intention of giving one priority to the other.⁴ Moreover, the mortgage first recorded, and therefore *primâ facie* the prior lien, may be shown to have been conditionally recorded; and a second mortgage, recorded before the condition was complied with, may be entitled to precedence.⁵

It is no ground for giving priority to a junior mortgage, that the money received upon it was used in conserving the mortgaged property, or in improving it in any way. Although a portion of a line of railway subject to a mortgage be wholly constructed by money raised on a second mortgage, yet this fact gives the latter no priority over the former. The prior mortgage, although given before the road is built, attaches as fast as it is built, and to all property covered by the terms of the mortgage, as fast as it comes into existence.⁶

¹ Beers v. Broome, 4 Conn. 247.

² Beers v. Hawley, 2 Conn. 467.

³ Stafford v. Van Rensselaer, 9 Cow. (N. Y.) 316.

⁴ Rhoades v. Canfield, 8 Paige (N. Y.), 545.

⁵ Freeman v. Schroeder, 43 Barb. (N. Y.) 618.

⁶ Galveston R. v. Cowdrey, 11 Wall. 459. "Had the first mortgage," says Mr. Justice Bradley, "been given before a shovel had been put into the ground to-

wards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it

609. When a mortgage has priority over a mechanic's lien. A mortgage executed before the commencement of a building erected on the land is paramount to a mechanic's lien for work and materials furnished for the building.¹ If a mortgagee, while in possession, erects a house on the premises, a mechanic's lien for this work is subsequent to the mortgage.² A mortgage for the purchase money has priority over a mechanic's lien, which attached to a building on the property while it was under contract for sale to the mortgagor, and before the deed and mortgage were executed.³

necessary for a railroad company to borrow in small parcels as sections of the road were completed, and trust deeds could be safely given thereon. The practice of the country and its necessities are coincident with the rule." See, also, *Willink v. Morris Canal & Banking Co.* 3 Green (N. J.) Ch. 377, 402.

¹ *Hershee v. Hershey*, 15 Iowa, 185; *Jessup v. Stone*, 13 Wis. 466; *Jean v. Wilson*, 38 Md. 288; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585; *Hoover v. Wheeler*, 23 Miss. 314.

² *Ferguson v. Miller*, 6 Cal. 402.

³ See § 466; *Rees v. Ludington*, 13 Wis. 276.

CHAPTER XIV.

VOID AND USURIOUS MORTGAGES.

Introductory. — In this chapter it is proposed to treat briefly of some of the circumstances under which a mortgage duly executed and recorded may be declared defective or void. These circumstances are inherent in the transaction itself, and in some form vitiate the consideration of the mortgage. For the most part, they are the same vices which invalidate any contract. Want or failure of consideration, and fraud or usury in it, are not matters peculiar to mortgages; and it is, of course, impossible to treat at length of these matters, which are themselves the subjects of general treatises under the titles of Contracts, Frauds, and Usury. Only adjudications relating especially to mortgages are presented; and these not fully on those points which are common to all contracts. The subject, however, opens one inquiry not presented in other contracts, and that is, whether the law of the place where the mortgaged land is situated, when the contract has been executed in another state or country, should govern as to the law of usury applicable to it; or should govern, too, as to other statutes which may invalidate the contract; and, therefore, this part of the subject has been examined more fully than its importance would seem to justify, except upon the principle that the importance of questions treated of should be determined by the relative difficulty or uncertainty attending them.

PART I.

VOID MORTGAGES.

1. *Want or Failure of Consideration.*

610. Consideration. — In general the same defences may be made to an action on a mortgage, the statute of limitations excepted, that may be made to an action on the debt, — as that it

was given for an illegal consideration, or was obtained by duress and fraud.¹ A mortgage, like every other contract, must be founded on a sufficient consideration. The consideration need not be one moving directly from the mortgagee to the mortgagor; but any benefit to the mortgagor or to a stranger, or damage or loss to the mortgagee, rendered or sustained at the request of the mortgagor, is sufficient.² In a mortgage of indemnity the liability of the mortgagee to loss or damage is a sufficient consideration for the mortgage.³ A liability to loss on the part of the mortgagee is a consideration for a mortgage given to secure him against it, as much as is a direct benefit to the mortgagor, of whatever nature it may be.⁴

In Maryland, under a provision of statute that no mortgage shall be valid except as between the parties, unless there be indorsed thereon an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bonâ fide* as therein set forth,⁵ the want of such affidavit is fatal to the validity of the mortgage when it is assailed by a creditor, or by a subsequent *bonâ fide* purchaser.⁶ One claiming under the mortgagor with notice stands in no better position in this respect than the mortgagor himself.⁷

611. It is not necessary that any consideration should pass at the time of the execution of the mortgage. That may be either a prior or a subsequent matter. Mortgages are very frequently given to secure existing debts, in which cases the consideration is generally, altogether, a past one.⁸ Moreover, the re-

¹ See §§ 64, 70, and chapters xxxii. division 3, and xxix. division 5; Vinton v. King, 4 Allen (Mass.), 562; Bush v. Cooper, 26 Miss. 599; Atwood v. Fisk, 101 Mass. 363, 366, per Ames, J.

² 1 Selwyn's N. P. 43; Magruder v. State Bank, 18 Ark. 9.

³ Simpson v. Robert, 35 Ga. 180.

⁴ Haden v. Buddensick, 4 Hun (N. Y.), 649.

⁵ Code, 1860, art. 24, § 29; Stat. 1846, c. 271. See § 366. This affidavit may be made at any time before the mortgage is recorded, before any one authorized to take the acknowledgment of a mortgage, and the affidavit shall be recorded with

the mortgage. Code, 1860, art. 24, § 29, p. 136.

The affidavit may be made by one of several mortgagees, or by an agent of a mortgagee, who shall, in addition to the above affidavit, make affidavit to be indorsed on the mortgage that he is such agent, which affidavit is proof of such agency, and the president, or other officer of a corporation, or the executor of the mortgagee, may make such affidavit. Ib. art. 20, § 30, p. 137.

⁶ Cockey v. Milne, 16 Md. 200.

⁷ Phillips v. Pearson, 27 Md. 242.

⁸ Wright v. Bundy, 11 Ind. 398; Cooley v. Hobart, 8 Iowa, 358.

newal of a note, or extension of the time of payment of a debt, is a sufficient consideration for a mortgage by a third person to secure such debt.¹

Sometimes, however, a mortgage is made for the purpose of raising money by subsequent negotiation, in which case the consideration is subsequent, and the mortgage has no validity until it is transferred to some one for value, and it is then subject to any incumbrance intervening before the negotiation of it.²

612. Want of consideration, or the failure of it, is a good defence to an action upon the mortgage.³ A mortgage for a fixed sum founded upon no consideration except an undertaking to furnish goods, which were never furnished, cannot be enforced, except in the hands of a *bonâ fide* purchaser for value.⁴ A mortgage given for future credit, if no advances are made upon it and no further credit is given, is without consideration. If taken for that purpose it cannot be enforced for a different purpose.⁵ The sum named in the deed as the consideration is of no importance when in terms the mortgage secures future advances.⁶ It is security for the advances actually made upon it, and for nothing further. When given to secure future advances, or the value of goods to be purchased, it is valid to the extent of the goods sold or the advances made on account of the mortgage, although the mortgagor be in fact insolvent at the time, and becomes bankrupt shortly afterwards.⁷

When a mortgage has been intrusted to an agent for the purpose of raising money, and the agent uses it for another purpose either wholly or in part, as for instance to secure a judgment against other persons, such use is a misappropriation of it, such as will invalidate the security.⁸ If an agent who is authorized only to receive a conveyance of lands to his principal takes a conveyance to himself, and makes a mortgage to one having notice of

¹ *Magruder v. State Bank*, 18 Ark. 9; *Bank of Muskingum v. Carpenter, Wright* (Ohio), 729.

² See § 86; *Schafer v. Reilly*, 50 N. Y. 61; *Mullison's Estate*, 68 Pa. St. 212.

³ *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Smith v. Newton*, 38 Ill. 230; *Conwell v. Clifford*, 45 Ind. 392.

⁴ *Fisher v. Meister*, 24 Mich. 447.

⁵ *McDowell v. Fisher*, 25 N. J. Eq. 93; *Mitzner v. Kussell*, 29 Mich. 229; *Fisher v. Meister*, 24 Mich. 447.

⁶ *Miller v. Lockwood*, 32 N. Y. 293.

⁷ *Marvin v. Chambers*, 12 Blatchf. 495.

⁸ *Craver v. Wilson*, 14 Abb. (N. Y.) Pr. N. S. 374.

the fact, it is void as against the principal.¹ An officer or agent, who takes a mortgage to himself to secure the payment of a debt to his principal, holds it by implication of law as trustee for the principal.²

613. A mortgage under seal implies consideration at common law, and none need be proved, and it is good if it is shown that none was given. Neither courts of law or equity will allow the consideration to be inquired into, for the sake of declaring the instrument void for want of consideration; but they will, for the purpose of ascertaining what is due upon it.³ In New Jersey it is provided by statute that the defence of fraud in the consideration of a deed may be made as fully as if the instrument were not under seal;⁴ and in New York a seal affords only presumptive evidence of a sufficient consideration; this presumption may be rebutted in the same manner and to the same extent as if the instrument were not under seal.⁵

614. A mortgage may be made by way of gift, when the rights of creditors are not thereby interfered with. When executed and delivered it is as valid as if it were based upon a full consideration. It is not open to the objection that it is a voluntary executory agreement, but may be enforced according to its terms, as an executed conveyance.⁶

615. To support a mortgage made for the accommodation of another, there must be a consideration. If the debt of the other person, which is thus secured by the mortgage, be already incurred, there must be a new and distinct consideration for the obligation incurred by the mortgagor, as surety or guarantor of that debt. But if the debt secured be incurred at the same time that the mortgage is given, and this collateral undertaking enters

¹ *Wisconsin Bank v. Morley*, 19 Wis. 62.

² *Rood v. Winslow, Walk.* (Mich.) 340. In this case the mortgage was to a county commissioner, the debt being due to the county.

³ *Farnum v. Burnett*, 21 N. J. Eq. 87; *Calkins v. Long*, 22 Barb. (N. Y.) 97; *Parker v. Parmele*, 20 Johns. (N. Y.) 130, 134.

⁴ *NEW JERSEY*: Laws, 1871, p. 8; and see *Feldman v. Gamble*, 26 N. J. Eq. 494, 496.

⁵ *NEW YORK*: 3 R. S. 1875, p. 672; *Craver v. Wilson*, 14 Abb. (N. Y.) N. S. 374.

⁶ *Bucklin v. Bucklin*, 1 A¹ b. App. Dec. (N. Y.) 242; *Brooks v. Dalrymple*, 12 Allen (Mass.), 102.

into the inducement to the creditor for giving the credit, then the consideration for such contract is regarded as consideration also for the collateral undertaking by way of mortgage.¹

616. When mortgagor estopped to deny consideration. — The mortgagor is not estopped by the mortgage from showing a failure or want of consideration for the note secured by the mortgage.² But this defence cannot be taken against an assignee for value before maturity.³ Such mortgage, though void between the original parties, is valid in the hands of a *bonâ fide* assignee without notice of the illegal consideration for which it was given.⁴ It may thus happen that the mortgagee may, in effect, give a better title than he himself holds. "In the case of a conveyance of real estate to defraud creditors, the grantee cannot hold, but one who takes it from him without notice may. But the law goes further in favor of commerce, and gives a high degree of character and honor to bills of exchange and promissory notes in the hands of an indorsee, without actual or constructive notice of anything affecting their validity or credit."⁵ But this rule does not apply to notes which are by statute made absolutely null and void, as notes made in violation of statutes against usury and gaming sometimes are.⁶

A note and mortgage deposited in escrow, and afterwards fraudulently taken and put in circulation, without the terms and conditions of the deposit having been complied with, are doubtless void in the hands of a purchaser or assignee for value without notice. In such case the mortgage never has a legal existence, and the rules of commercial paper have no application to the note accompanying it, although it be negotiable in form.⁷

¹ Davidson v. King, 51 Ind. 224. See § 458.

² Jones v. Jones, 20 Iowa, 388; Wearse v. Peirce, 24 Pick. (Mass.) 141.

³ Cornell v. Hichens, 11 Wis. 353; Stillwell v. Kellogg, 14 Wis. 461.

⁴ Cazet v. Field, 9 Gray (Mass.), 329; Brigham v. Potter, 14 Gray (Mass.), 522; Taylor v. Page, 6 Allen (Mass.), 86; Earl v. Clute, 2 Abb. App. Dec. (N. Y.) 1, and cases cited. In North Carolina it is provided by statute that no conveyance or mortgage, made to secure the payment of

a debt, shall be void in the hands of a purchaser for value without notice, for the reason that consideration of the debt was forbidden by law. Battle's Revisal, 1873, c. 50, § 5. This statute applies to usurious mortgages. Coor v. Spicer, 65 N. C. 401.

⁵ Per Shaw, C. J., in Cazet v. Field, *supra*.

⁶ Bowyer v. Bampton, 2 Stra. 1155; Kendall v. Robertson, 12 Cush. (Mass.) 156.

⁷ Chipman v. Tucker, 38 Wis. 43; S. C.

2. *Illegal Consideration.*

617. **Illegality of consideration** avoids a mortgage, whether it consist in a violation of the common law or of a statute.¹ A mortgage given to secure a debt made illegal by statute, as for instance a debt incurred for intoxicating liquors illegally sold to the mortgagor, cannot be enforced; and such a mortgage is invalid, although not given to the seller of the liquors, but at his request to a creditor of his, who knew that the consideration was illegal.² But if the mortgage be given for an illegal consideration, and the consideration not being performed the mortgagee enters to foreclose, and keeps possession till foreclosure is complete, he then has an absolute title, and the value of the land is applied by operation of law to the payment of the debt secured by the mortgage. The land is then irretrievably gone, unless the law be such that the illegal consideration, when paid, can be recovered back, not merely in money but in land. It has been held that a payment in land for intoxicating liquors illegally sold could not be recovered back, and therefore that upon the foreclosure of a mortgage for such a debt, the land cannot be recovered by the mortgagor.³

A mortgage by a citizen of Tennessee, executed to a citizen of Kentucky after the proclamation of the President declaring the State of Tennessee to be in a state of insurrection, and forbidding all intercourse with its inhabitants, was held void, although the land was situate in the State of Kentucky.⁴ A mortgage given in Tennessee during the civil war, in consideration of a loan in Confederate treasury notes, was after the war held void, on the ground that the consideration of the contract was illegal, being notes issued by an unlawful confederation of states. Such contracts are against public policy, and the courts will not lend their aid to enforce them.⁵ But on the contrary, such a mortgage was sustained in Alabama, on the ground that it was valid under the *de facto* government existing when it was executed.⁶

20 Am. Rep. 1; *Andrews v. Thayer*, 30 Wis. 228; *Walker v. Ebert*, 29 Wis. 194; *Fisher v. Beckwith*, 30 Wis. 55; *Burson v. Huntington*, 21 Mich. 415; *Powell v. Conant*, 33 Mich. 396. See § 87.

¹ *Gilbert v. Holmes*, 64 Ill. 548.

² *Baker v. Collins*, 9 Allen (Mass.), 253.

³ *McLaughlin v. Cosgrove*, 99 Mass. 4.

⁴ *Hyatt v. James*, 2 Bush (Ky.), 463.

⁵ *Stillman v. Looney*, 3 Cold. (Tenn.) 20.

⁶ *Scheible v. Bacho*, 41 Ala. 423.

618. Contrary to public policy. — But if land be conveyed to one absolutely as security for a sum of money to be due him upon his doing an unlawful act, as for instance procuring witnesses to testify to a certain state of facts in behalf of the grantor, the transaction is not a mortgage. The title is not divested upon the grantor's failure to perform the illegal stipulation, but is absolute in him, and the grantor cannot recover it either in law or in equity.¹

A mortgage executed in consideration that the mortgagee would use his efforts to obtain a *nolle prosequi* to an indictment pending against the mortgagor is against public policy and void.² So is one given in composition of a felony, or of a promise not to prosecute for a crime of lower degree than a felony.³

A mortgage, or a deed in the nature of a mortgage, given to secure the performance of a contract contrary to the policy of the law, will not be enforced by a court of equity; such for instance is a contract which is subject to the objection of champerty.⁴

A mortgage given upon lands held by a settler under the pre-emption act, before he has entered the lands at the land office, is void under the act of Congress forbidding any conveyance before such entry.⁵

619. Who may take advantage of the illegality. — As a general rule contracts prohibited by statute are void, and courts will neither enforce them nor aid in the recovery of money paid in pursuance of them. "The meaning of the familiar maxim, *In pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts."⁶ The principle in such cases is the same in equity as at law: while the courts will not aid the mortgagee to enforce payment of an illegal mortgage, they will

¹ Patterson v. Donner, 48 Cal. 369.

² Willey v. Collier, 7 Md. 273.

³ Collins v. Blantern, 2 Wils. 341, 350; Atwood v. Fisk, 101 Mass. 363.

⁴ Gilbert v. Holmes, 64 Ill. 548.

⁵ See § 176; Brewster v. Madden, 15

Kas. 249. See, as to mortgage of cemetery lot, Lautz v. Buckingham, 4 Lans. (N. Y.) 484.

⁶ Atwood v. Fisk, 101 Mass. 363, per Mr. Justice Ames.

not aid the mortgagor to obtain a cancellation of the incumbrance. Both parties are left without remedy, when the contract is one that is prohibited as immoral or against public policy.¹ When the illegal consideration has been paid to one of two persons interested in it, the court will not aid the other to recover his share of it; it does not enforce the sentiment of "Honor among thieves."² In the language of Lord Chief Justice Wilmot,³ "You shall not stipulate for iniquity; all writers upon our law agree in this, no polluted hand shall touch the pure foundations of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O! procul este profani.*"

Gaming contracts, contracts made on the Sabbath, contracts of champerty and maintenance, contracts made in composition of felony, and many others of like nature, might be mentioned as examples. "But sometimes contracts are prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess over him. In such cases the parties are not regarded as being equally guilty, and so the rule is not deemed applicable, though both have violated the law.⁴ As an example of kind, a usurious contract is mentioned, which may be void as to the mortgagee while valid as to the mortgagor.

In accordance with this distinction, a law providing that school funds shall be loaned only upon unincumbered real estate does not render void a mortgage taken in violation of this statute, by the officer charged with making the loan. The mortgagor cannot claim that such a mortgage is illegal and cannot be enforced against him.⁵

A statute providing that a trustee, before entering upon the discharge of his duties, shall give a bond for the faithful discharge of

¹ James v. Roberts, 18 Ohio, 548.

² Woolworth v. Bennett, 43 N. Y. 273.

³ Collins v. Blantern, 2 Wils. 341, 350.

⁴ Deming v. State, 23 Ind. 416. See Raguet v. Roll, 7 Ohio, 77; S. C. 4 Ib. 419; Cowles v. Raguet, 14 Ohio, 38. An

important element in this case was that Raguet not only agreed not to prosecute, but agreed to use his influence to prevent a prosecution.

⁵ Deming v. State, *supra*. And see Mann v. Best, 62 Mo. 491.

his duties, does not prevent the legal estate vesting in him under a mortgage or deed of trust regularly executed.¹

620. When the illegal consideration can be separated. —

When the consideration of a mortgage is made up of several distinct transactions, some of which are legal and others are not, and the one can be separated with certainty from the other, the mortgage may be upheld for such part of the consideration as was free from the taint of illegality.² In equity a mortgage securing a debt usurious in part, but valid in part, may be upheld for the latter, although in terms the statute of usury makes the obligation void altogether. Thus, where the maker of such a mortgage comes into equity, and asks that such a mortgage be surrendered as a cloud on the title to his lands, and that the court will so direct, although it cannot require him to pay the usurious debt, or any part of it, it may require him to pay the other part of it which at law and in equity he owes. The court will require him to do equity before it will administer the relief asked for.³

A mortgage fraudulently made to include a sum not due or which had been paid is absolutely void. But if the sum secured be made up in part of a sum inadvertently included and without fraudulent intent, then the mortgage may be valid for the actual debt secured, and void as to the rest.⁴

When part of the consideration of a note and mortgage is the suppression of a criminal prosecution against the mortgagor, he can avail himself of this fact as a defence to a suit to enforce either of them, although the prosecution is for an embezzlement of funds, by which the mortgagor not only committed a crime but incurred a debt. The effect upon the mortgage in such case is the same as if the whole consideration had been illegal. The illegal part cannot be separated from the legal, but the illegality taints the whole.⁵

621. A mortgage may be valid in part and void in part.⁶ —

¹ *Gardner v. Brown*, 21 Wall. 36.

³ *Williams v. Fitzhugh*, 37 N. Y. 444.

² *Feldman v. Gamble*, 26 N. J. Eq. 494; *Williams v. Fitzhugh*, 37 N. Y. 444, applied to usury; *McCravey v. Alden*, 46 Barb. (N. Y.) 272; *Cook v. Barnes*, 36 N. Y. 520; and see *Carleton v. Woods*, 28 N. H. 290.

⁴ *Werden v. Hawes*, 10 Conn. 50.

⁵ *Atwood v. Fisk*, 101 Mass. 363, 366, per Ames, J.

⁶ *Leeds v. Cameron*, 3 Smn. 488; *Johnson v. Richardson*, 38 N. H. 353; *Rood v. Winslow*, 2 Dougl. (Mich.) 68; *S. C.*

A mortgage of land and slaves, executed while slavery was recognized, was vitiated by the abolition of slavery only as to the lien upon the slaves.¹

Where a bond of defeasance was assigned by a debtor to a creditor, who paid the debt to secure which the conveyance was made, whereupon the land was conveyed to him, and he gave the debtor a new bond conditioned for the reconveyance of the land upon the payment of the amount of both debts, the transaction, so far as the debt of the second creditor was secured, was void under the insolvent laws; but the conveyance being a valid security for the first debt, the land was a valid security in the hands of the second creditor for the amount paid by him to the first creditor.²

A mortgage given by a third person at the solicitation of another to secure his debt for a specific purpose, as for instance the purchase price of certain goods about to be sold him, if fraudulently made to cover in part an existing indebtedness, is void as to such part of it, though valid as to the part used for the purpose intended. Although the mortgagee has taken such mortgage in good faith, if he has not put himself in any worse position in regard to the old indebtedness, if he has not done anything or parted with anything in reliance upon the mortgage, he cannot claim that the surety should suffer for the fraud by reason of negligence in executing the mortgage which rendered the fraud possible.³

622. The burden of proof is upon the party who sets up the defence of the want of consideration or the illegality of it, to make it out by clear and strong proof.⁴ A mortgage in due form and duly executed implies a valid consideration.

Evidence of the payment of interest upon a mortgage is admissible to show its validity when this is disputed.⁵

3. *Mortgages executed on Sunday.*

623. Mortgage for debt contracted on Sunday. — The statutes forbidding the transaction of business on Sunday have the

Walk. 340; *M'Murray v. Connor*, 2 Allen (Mass.), 205.

¹ *Lavillebeuvre v. Frederic*, 20 La. Ann. 374.

² *Judd v. Flint*, 4 Gray (Mass.), 557.

³ *Smith v. Osborn*, 33 Mich. 410.

⁴ *Stuart v. Phelps*, 39 Iowa, 14; *Feldman v. Gamble*, 26 N. J. Eq. 494; *Brigham v. Potter*, 14 Gray (Mass.), 522.

⁵ *Floyd Co. v. Morrison*, 40 Iowa, 188.

effect to render void all contracts executed upon that day.¹ It has sometimes been said that such contracts, being immoral and illegal only as to the time they are entered into, may be affirmed upon a subsequent day, and thus made valid.² But it seems incorrect to say that a mere ratification can impart legal efficacy to a contract which has no legal existence.³ The logical theory would seem to be that nothing but an express promise, subsequently made, founded upon the consideration emanating from the illegal contract, will avail to support an action having that consideration for its basis. Upon this theory it was held that although a promissory note made and delivered on Sunday for a loan of money made at the time is illegal and cannot be enforced, yet the obligation to return the money is a sufficient consideration to support a mortgage subsequently given to secure it. The mortgage constitutes a new promise founded on such obligation, and having no taint of illegality, such as the note had, it may be enforced.⁴

When a deed of land was executed and delivered on Sunday, to indemnify the mortgagee, and under an oral agreement that he should hold the land in trust for the mortgagor after satisfying his claim, in accordance with which agreement a declaration of trust was afterwards executed, it was held that the fact that the deed was executed and delivered on Sunday did not entitle the grantee to hold the land discharged of the trust.⁵ The rule, that no action based on a contract made on Sunday can be maintained to enforce its obligations in favor of either party, cannot be so applied as to enlarge the interest conveyed by the grantor, or to defeat his equitable title. "The apparent title conveyed,"

¹ Under the Massachusetts statute of 1791, prohibiting the doing of any manner of labor, business, or work, between the midnight preceding and the sunset of the Lord's day, and declaring void the execution of any civil process from the midnight preceding to the midnight following that day, it was held that a mortgage executed, acknowledged, and recorded, after sunset on Sunday evening, was not void. *Tracy v. Jenks*, 15 Pick. (Mass.) 465.

² *Adams v. Gay*, 19 Vt. 358, per Redfield, J. See *Tucker v. West*, 29 Ark. 386, for a review of the Sunday laws of many of the states.

³ "The parties cannot legalize that

which the law has declared illegal. It is competent to them to impart new efficacy to a voidable act, but they have no power to give life to an act, which, from reasons of public policy, has been ordained by the legislative authority to be absolutely void." Per Chief Justice Beasley, in *Reeves v. Butcher*, 31 N. J. L. 224.

⁴ *Gwinn v. Simes*, 61 Mo. 335. In *Harrison v. Colton*, 31 Iowa, 16, it is held that a contract made on Sunday may be afterwards ratified. See *Heller v. Crawford*, 37 Ind. 279.

⁵ *Faxon v. Folvey*, 110 Mass. 392. See *Hall v. Corcoran*, 107 Mass. 251, and cases cited. *Myers v. Meinrath*, 101 Mass. 366.

says Mr. Justice Colt, "was qualified by the trust imposed upon it, as effectually as if the terms of the trust were contained in the deed itself. Neither party to the transaction, or those claiming under them, can be permitted to take advantage of the alleged illegal act. The title, such as it was, passed to the grantee, and was held, as we have found, in trust. The purpose of the trust declared was neither immoral, contrary to the statutes, or contrary to public policy; the only illegality charged is in the time when, by the conveyance and agreement, the trust was created. Under such circumstances the law does not interfere to undo what the parties have done, by setting aside their deeds. Neither party can now assert rights inconsistent with the conveyances."

4. *Fraudulent Mortgages.*

624. A mortgage obtained by fraud is void, and a discharge of it may be decreed in equity.¹

When a deed of land has been procured by fraud, and the grantee has conveyed it to a purchaser in good faith, so that the land itself is beyond the reach of the grantor, yet, if such purchaser has given a mortgage for a portion of the purchase money to a party who fraudulently obtained the deed, he may in equity be compelled to transfer the mortgage to the party defrauded. It is an established doctrine, that when the legal estate has been acquired by fraud, the taker may in equity be regarded as trustee of the party defrauded, who may recover the estate or its avails when these can be distinctly identified.² A bill to set aside a mortgage procured by fraud may be filed by one of several mortgagors, who have secured the several notes of each by a joint mortgage of one tract of land.³ It is fraud in a creditor to induce his debtor to secure an old debt by mortgage upon the condition of advancing a further sum, and when he has obtained the security to refuse to make the advance, and a court of equity will annul the conveyance. In such case the mortgagee cannot claim that there is no loss, and that therefore the mortgage is *damnum absque injuria*. The mere existence of the mortgage is itself an injury, and an action to enforce it a greater.⁴

¹ *Mason v. Daly*, 117 Mass. 403; *Wartemberg v. Spiegel*, 31 Mich. 400; and see *Richardson v. Barriek*, 16 Iowa, 407; *Terry v. Tuttle*, 24 Mich. 206.

² *Cheney v. Gleason*, 117 Mass. 557. "

³ *Moulton v. Lowe*, 32 Me. 466.

⁴ *Gross v. McKee*, 53 Miss. 536.

The fact that the mortgagor is in possession, and can maintain his possession against the mortgagee at law, does not prevent his maintaining a bill in equity to set aside a fraudulent mortgage.¹

625. A fraudulent intent on the part of the mortgagee in obtaining the mortgage must be shown to render it void.² To have this effect, it is necessary that there should be something more than mere folly on the part of the mortgagor. A mortgagee may meet an allegation that a mortgage was obtained through his false and fraudulent representations, by evidence that the mortgagor executed the mortgage without his solicitation. The weight to be given to the evidence is a question for the jury.³ A fraudulent misrepresentation as to the value of property sold by the mortgagee, in payment of which he has taken a mortgage, does not avoid the mortgage if there was any value at all in the property sold. The property which was the subject of the sale and mortgage must first be restored to the vendor, or a reconveyance tendered, before the mortgage can be rescinded.⁴

The representation of a mortgagee, that he would not enforce the mortgage, is no defence to it, because such a parol promise cannot be offered in evidence.⁵

626. A mortgage obtained by duress is void. — A mortgage obtained through threats of a groundless prosecution is void, and a court of chancery will restrain its collection.⁶ It is even held that a mortgage obtained from a married woman by duress on the part of the husband is void, although the mortgagee took no part in procuring it, on the ground that he allowed the husband to act as his agent, and is bound by his acts.⁷ A mortgage given under threats by the creditor of a criminal prosecution for a felony, unless the debt be secured, is not void, if the debt was actually due, and the debtor was in duty bound to pay or secure it. The giving of the mortgage in such case is not the compounding of a felony.⁸ But if a mortgage be given without considera-

¹ *Marston v. Brackett*, 9 N. H. 336.

² See chapter xxxii. division 3, and chapter xxix. division 5.

³ *Blackwell v. Cummings*, 68 N. C. 121.

⁴ *Sanborn v. Osgood*, 16 N. H. 112.

⁵ *Catlin v. Fletcher*, 9 Minn. 85.

⁶ *James v. Roberts*, 18 Ohio, 548; *Eyster v. Hatheway*, 50 Ill. 521; and see *Lightfoot v. Wallis*, 12 Bush (Ky.), 498.

⁷ *Central Bank of Frederick v. Copeland*, 18 Md. 305.

⁸ *Plant v. Gunn*, 2 Woods, 372.

tion under threats of a groundless prosecution, a court of equity will grant relief and restrain the collection of it.¹

To avoid a mortgage on account of duress by imprisonment, it must appear that the imprisonment was unlawful, and that it was executed in order to obtain a release from it. "If I be arrested upon good cause, and being in prison, or under arrest, I make an obligation, feoffment, or any other deed to him at whose suit I am arrested, for my enlargement, and to make him satisfaction, this shall not be said to be by duress, but is good, and shall bind me."²

A mortgage given to a county to secure the payment of a sum of money, as the condition of a pardon, is not void as being given under duress.³

A mortgage given for a legal debt, but with the motive not to incur the risk of offending a wealthy and influential friend, who might prove highly serviceable to the mortgagor and his family, is not given under duress.⁴

627. Mortgages made to defraud creditors. — Except under bankrupt and insolvent laws, a mortgage made with the intent to prefer one creditor to another is valid.⁵ although a mortgage made with the intent upon the part of the mortgagor to hinder, delay and defraud his creditors is void at common law and by statute, generally, except in case the mortgagee did not participate in or have knowledge of such intent.⁶ Such mortgage can be declared void as to him only upon proof of his knowledge of the fraudulent intent.⁷ It is incumbent upon the mortgagee to show that the mortgage was made for a valuable and adequate consideration; and when that appears, the burden of proving a fraudulent intent on his part rests with the creditors who assail the transaction. Proof of the embarrassed condition of the mortgagor at the time, and of the mortgagee's relationship to him, is insufficient to establish a fraudulent intent;⁸ as is also the fact that the mortgagor

¹ *James v. Roberts*, 18 Ohio, 548. See *Ragnet v. Roll*, 7 Ohio, 77; *Cowles v. Ragnet*, 14 Ohio, 38.

² 1 *Shep. Touch.* 62; and see *Watkins v. Baird*, 6 Mass. 506; *Plant v. Gumm*, 2 Woods, 372.

³ *Rood v. Winslow*, 2 Doug. (Mich.) 68.

⁴ *Dolman v. Cook*, 14 N. J. Eq. 56.

⁵ *Giddings v. Sears*, 115 Mass. 505.

⁶ *Price v. Masterson*, 35 Ala. 483.

⁷ *Hall v. Heydon*, 41 Ala. 242; *Tickner v. Wiswall*, 9 Ala. 305; *Wiley v. Knight*, 27 Ala. 336.

⁸ *Troy v. Smith*, 33 Ala. 469; *Banfield v. Whipple*, 14 Allen (Mass.), 13.

immediately afterwards executed a general assignment in favor of his creditors.¹ When the object of a mortgage is solely to secure a debt to the mortgagee, it is not fraudulent at common law, although both the debtor and creditor knew that the effect of it would be to put the property out of the reach of other creditors.²

If one of the purposes of making a mortgage was to put the property out of the reach of the mortgagor's creditors, although the principal purpose of the parties was to secure a *bonâ fide* debt of the mortgagor, it is nevertheless void as to his creditors.³

The circumstance that a mortgage is made in the form of an absolute conveyance by a debtor, in failing circumstances, to a creditor, is no evidence of an intention to defraud other creditors.⁴ Neither is a mortgage fraudulent as to creditors, because it is given for a greater sum than is due, but in fact to cover, in part, future advances, although it does not express upon its face that the excess is for future advances.⁵ It would be fraudulent, however, if not given in good faith, and the securing of future advances be only a pretence.⁶

If given to secure existing liabilities, it is not void as to creditors, because it does not specify the amount secured;⁷ nor because the sum secured was made up in part by an allowance of interest not recoverable at law upon the debt,⁸ or that it includes debts due to other persons which the mortgagee verbally promises to pay.⁹

628. A mortgage may be fraudulent with reference to a particular creditor of the mortgagor, as for instance against a mechanic, who was induced to delay the signing of a contract for the building of certain houses until the landowner had executed and recorded a mortgage without consideration to a third person, with the intention that the mortgagee should enter under it, and defeat the lien of the mechanic. The mechanic in such case is entitled to maintain a bill to restrain an assignment of the mort-

¹ *Lyon v. McIlvaine*, 24 Iowa, 9; *Lampson v. Arnold*, 19 Ib. 479.

² *Giddings v. Sears*, 115 Mass. 505.

³ *Crowninshield v. Kittridge*, 7 Met. (Mass.) 520; *Robinson v. Stewart*, 10 N. Y. 189.

⁴ *Doswell v. Adler*, 28 Ark. 82, and 300. cases cited.

⁵ *Tully v. Harloe*, 35 Cal. 302.

⁶ *Tully v. Harloe*, *supra*.

⁷ *Youngs v. Wilson*, 27 N. Y. 351, reversing S. C. 24 Barb. 510.

⁸ *Spencer v. Ayrault*, 10 N. Y. 202.

⁹ *Carpenter v. Muren*, 42 Barb. (N. Y.)

gage, and to compel its cancellation, even before the houses are completed and the money under the contract has become due. The priority of lien to which the mechanic is entitled may be secured to him beforehand, inasmuch as his security is impaired by the fraudulent mortgage, and he is exposed to the chance that the mortgage may pass into the hands of a *bonâ fide* assignee for value.¹

629. Fraudulent preferences. — A mortgage given to secure a debt to a creditor, who has, with others, executed a composition with a debtor to accept a portion of their claims in satisfaction, under a secret arrangement whereby the debt of such creditor is to be paid in full, is a fraud upon the other creditors, and is void.²

A mortgage made with the intent to prefer contrary to law is void against the assignee in insolvency or bankruptcy of the mortgage, although the property be a homestead, and exempted from execution.³

Though a mortgage be fraudulent and void as to a creditor, the mortgagor cannot avoid it.⁴ Such a mortgage conveys the property, and is binding between the parties.⁵ Although the mortgagee has participated in the fraudulent intent, it is voidable only at the election of the creditors. If they do not intervene the conveyance stands.⁶ The mortgagor will not be heard to allege his own fraud.⁷

630. Who may take advantage of the fraud. — A creditor of the mortgagor, after levying execution on the equity of redemption and purchasing it at the sheriff's sale, may prove that a second mortgage, or a release of the equity to the second mortgagee by the mortgagor, is fraudulent and void by reason of fraud practised on the mortgagor, although the mortgagor himself has made no attempt to avoid it.⁸ So may a purchaser of the equity

¹ *Hulsman v. Whitman*, 109 Mass. 411. Conn. 20; *Salmon v. Bennett*, 1 Conn. 525.

² *Feldman v. Gamble*, 26 N. J. Eq. 494, and cases cited; *Lawrence v. Clark*, 36 N. Y. 128.

³ *Beals v. Clark*, 13 Gray (Mass.), 18.

⁴ See § 626; *Stores v. Snow*, 1 Root (Conn.), 181; see *Abbe v. Newton*, 19

⁵ *Parkhurst v. McGraw*, 24 Miss. 134.

⁶ *Harvey v. Varney*, 98 Mass. 118, and cases cited; *Upton v. Craig*, 57 Ill. 257.

⁷ Per Shaw, C. J., in *Dyer v. Homer*, 22 Pick. (Mass.) 253.

⁸ *Van Deusen v. Frink*, 15 Pick. (Mass.) 449.

of redemption, upon execution sale, maintain an action to set aside a deed on account of fraud.¹

631. When the mortgagor is estopped to claim invalidity. A mortgagor is not estopped from setting up the invalidity of his mortgage, unless there has been some fraud, misrepresentation, or concealment on his part.² But he is estopped from setting up any defence which is inconsistent with representations made by him in obtaining the loan, which the mortgage was given to secure, when the lender has relied upon these representations in making the loan and taking the mortgage. Thus, if a mortgagor induce a person to purchase the mortgage by a statement or certificate that a certain sum is due upon it, and that there is no offset or defence to it, the borrower is precluded from claiming that this sum is not the true amount due, or that the mortgage is void, either wholly or in part, for usury.³ But if the purchaser of the security did not believe the existence of the facts in reference to which the estoppel is sought to be interposed, and did not act upon any such belief, the mortgagor is not estopped to show the real facts of the case.⁴ To create a valid estoppel, the holder of the mortgage must have purchased in reliance upon the truth of the representations. Therefore, where a mortgage and a certificate accompanying it that the mortgage was given "for a good and valid consideration to the full amount thereof, and that the same is subject to no offset or defence whatever," were both procured by fraud, and the purchaser did not rely upon the truth of the certificate, but upon the effect of it, as a matter of law, to protect him, it was held that the mortgagor could still set up the fraud in defence to the mortgage.⁵

¹ *Matson v. Capelle*, 62 Mo. 235.

² *Brewster v. Madden*, 15 Kans. 249. See *Wilson v. Watts*, 9 Md. 356.

³ *Lesley v. Johnson*, 41 Barb. (N. Y.) 359; *Eitel v. Bracken*, 38 Superior Ct. (N. Y.) 7. "It is a wise and just restriction, that if a mortgagor makes a false statement, orally or in writing, to influence the purchase of the security, he cannot take advantage of it as against an innocent purchaser. The law adjudges him to be estopped from profiting by his own fraud." Per Curtis, J.

⁴ *Eitel v. Bracken*, *supra*; *Van Sickle v. Palmer*, 2 T. & C. (N. Y.) 612; *Wilcox v. Howell*, 44 N. Y. 398.

⁵ *Eitel v. Bracken*, *supra*, per Curtis J. "It is contrary to good morals, that a certificate containing an unadulterated falsehood, and known to both the maker and recipient to be simply such, should be sustained as sufficient to protect the latter in the purchase of a mortgage, because he believed it would so protect him as a matter of law, and would not have bought the mortgage without it."

A mortgage made to aid an officer in the settlement of his official accounts by making up a deficiency, and used for that purpose, cannot afterwards be repudiated by the maker as invalid. He cannot complain that after having accomplished its purpose by being used as evidence of a loan with his consent, it is held to be a valid obligation.¹ He is estopped, too, from denying the official character of the grantee, as a commissioner of the school fund, although the office had been abolished. The mortgage being intended as a security for the school fund, it will be given the effect intended by the parties; and the maker will not be allowed to deny its recitals.²

632. Estoppel to claim the mortgage was made to defraud creditor. — A mortgagor is not allowed to invalidate his own deed by showing that it was executed by him for the purpose of defrauding his creditors. A court of equity will not lend its aid to relieve the mortgagor from the consequences of his own fraudulent act, nor will it aid the mortgagee in securing him in the enjoyment of the property, where its interposition is necessary for that purpose. The mortgagee is left to his legal remedies, which will enable him, when invested with the legal title, to recover the possession of the mortgaged property. So far as the contract is executory, he is without remedy, either legal or equitable.³

A defence to the enforcement of a mortgage for the want of consideration cannot be met by evidence that the mortgage was given with a view to defraud the creditors of the mortgagor. "The general rule of policy is, *In pari delicto potior est conditio defendentis*. If there was an intent to defraud creditors, it was an intent common to both parties, affecting as well the plaintiff's intestate as the defendant. It is the plaintiff who is the actor, and is seeking to enforce the payment of these notes. It may well be held, that the defendant would not be permitted to show that the notes were made to delay and defeat creditors as a substantive ground of defence, on the well known maxim, *Nemo allegans suam turpitudinem audiendus sit*: and therefore if a legal consideration were shown, such a defence could not avail. But independently of this ground, he shows want of consideration, and it is the demandant who seeks to rebut that defence, by showing

¹ Floyd Co. v. Morrison, 40 Iowa, 188. ³ Brookover v. Hurst, 1 Met. (Ky.) 665.

² Floyd Co. v. Morrison, *supra*.

that the notes were given as well to defeat creditors as without consideration.”¹

PART II.

USURY.

1. *What Mortgages are Usurious.*

633. Usury laws apply to mortgages in the same manner that they apply to contracts in general, and the same principles of law are applicable to the inquiry, whether they are usurious or not. The subject of usury is of less importance now than it was formerly, for the reason that within a few years the usury laws have been repealed in several states, and in others they have been greatly modified, so that only in a few states does usury now invalidate a contract. A brief statement of the laws of the several states with reference to interest and usury is given in a note; but it is to be borne in mind that these laws are at present subject to frequent changes.²

¹ *Wearse v. Peirce*, 24 Pick. (Mass.) 141, per Shaw, C. J.

² It appears that in the states of Maine, Massachusetts, Rhode Island, South Carolina, Florida, California, Nevada, and in the Territories of Utah, Arizona, Montana, New Mexico, Wyoming, and Washington, there are no usury laws, and the parties may contract in writing for any rate of interest; that in Connecticut, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and West Virginia, all that is left of former stringent provisions is a forfeiture merely of the usury above the legal interest; that in Alabama, Illinois, Kentucky, Louisiana, Nebraska, New Jersey, Virginia, Wisconsin, Dakota, and the District of Columbia, usury forfeits all interest; while in New York, Delaware, North Carolina, Arkansas, and Oregon, usury makes void the security. In Missouri usury works a forfeiture of ten per cent., and in Iowa ten per cent. of the contract and all illegal interest. In Idaho the forfeiture is three times the interest, and there is also a fine of \$100. In North Carolina the forfeiture is

double the loan. In that state, and also in Tennessee, usury is punishable as a misdemeanor.

ALABAMA. — The rate is eight per cent. per annum. Usury forfeits the interest, but the principal may be recovered. Rev. Code, 1867, §§ 1827, 1831, 2781.

ARIZONA TERRITORY. — Ten per cent. is the legal rate when there is no express agreement, but the parties may contract in writing for any rate. Acts 1864, p. 46, §§ 1, 4.

ARKANSAS. — Six per cent. is the legal rate, but parties may contract for any rate not exceeding ten per cent. Usury renders the contract void both as to principal and interest. Constitution, 1874, art. 19, § 13.

CALIFORNIA. — The legal rate is ten per cent., but the parties may contract for any rate, simple or compound. Judgments bear interest from date of entry, at seven per cent. Civil Code, 1872, §§ 1917–1920.

COLORADO. — Ten per cent. is the legal rate on loans and accounts. Rev. Stat. 1868, c. 44, § 1.

CONNECTICUT. — Seven per cent. is the

634. Intent to take usury. — A mortgage given to secure a just debt is neither invalid as against the mortgagor, nor fraudulent.

legal rate. Usury forfeits the interest in excess. Gen. Stat. 1875, p. 351.

DAKOTA TERRITORY. — Seven per cent. is the legal rate, but parties may contract for a higher rate not exceeding twelve per cent. Usury forfeits all interest. Code, 1877, §§ 1097-1102.

DELAWARE. — Six per cent. is the legal rate. Usury forfeits a sum equal to the whole loan. Rev. Code, 1874, c. 63, § 1.

DISTRICT OF COLUMBIA. — The legal rate is six per cent. Parties may stipulate, in writing, for a rate not exceeding ten per cent. Usury forfeits a sum equal to the whole interest to be recovered by suit within one year after payment. Rev. Stat. D. C. §§ 713, 717.

FLORIDA. — Eight per cent. is the rate where no other is agreed upon; but any rate is allowed. Bush Dig. p. 368.

GEORGIA. — Seven per cent. is the legal rate; but parties may contract in writing for any rate not exceeding twelve per cent. Interest in excess of that is forfeited. Code, 1873, §§ 2050, 2051; Acts 1875, p. 105.

IDAHO TERRITORY. — Ten per cent. is the legal rate. Parties may contract in writing for any rate not exceeding two per cent. per month; though a judgment bears only ten per cent. interest. Penalty for usury is forfeiture of three times the interest paid, and liability to fine of one hundred dollars, or six months' imprisonment, or both. Rev. Laws, 1875, p. 646.

ILLINOIS. — Six per cent. is the legal rate, but parties may contract in writing for any rate not exceeding ten per cent. Usury forfeits the entire interest. Corporations cannot interpose this defence. Rev. Stat. 1874, p. 614, §§ 1, 4, 6, 11.

INDIANA. — The legal rate is six per cent., but parties may contract in writing for any rate not exceeding ten. Usury forfeits the excess. Rev. Stat. 1876, p. 599, c. 158.

IOWA. — The legal rate is six per cent., but parties may agree in writing for a rate

not exceeding ten. Usury forfeits ten per cent. on the amount of contract to the school fund, and only the principal can be recovered. Code, 1873, §§ 2077, 2080.

KANSAS. — Seven per cent. is the legal rate, but parties may contract in writing for interest not exceeding twelve per cent. Payments in excess of that rate are to be accounted as payments on the principal and interest at twelve per cent. G. St. 1868, p. 525, 526, §§ 1, 3; Dassel's St. 1876, c. 51.

KENTUCKY. — The legal rate is six per cent., but parties may contract in writing for interest not exceeding ten per cent. Upon the death of a promisor in a contract for a higher rate than six per cent., or after judgment upon such a contract, the rate is six per cent. Usury forfeits the entire interest. Gen. Stat. 1874, c. 60, art. 1, 2.

LOUISIANA. — Five per cent. is the legal rate. Eight per cent. may be stipulated, and a higher rate may be received if embodied in the face of the obligation, or by way of discount; but no higher rate than eight per cent. is lawful after the maturity of the obligation. A higher rate forfeits the entire interest. Judgments bear the same rate as the contract. Rev. Stat. 1870, §§ 1883, 1890.

MAINE. — Six per cent. is the legal rate, but the parties may agree in writing for any rate. Rev. St. t. 1871, c. 45.

MARYLAND. — Six per cent. is the legal rate. Usury forfeits the excess above that rate. Code, 1860, p. 696, §§ 1-5.

MASSACHUSETTS. Six per cent. is the legal rate, but parties may contract in writing for any rate. Gen. Stat. 1860, c. 53, §§ 3-5; Stat. 1867, c. 56.

MICHIGAN. — Seven per cent. is the legal rate, but parties may contract in writing for a higher rate not exceeding ten per cent. Usury forfeits the excess; but it cannot be recovered after a voluntary payment. A purchaser in good faith of negotiable paper is not affected by the

lent as against his creditors, because interest has been calculated upon the debt and included in the mortgage in excess of the

usury. Compiled Laws, 1871, p. 540, §§ 2, 4, 5.

MINNESOTA. — Seven per cent. is the legal rate. Parties may agree in writing upon any rate not exceeding twelve per cent. A contract for more cannot be enforced for the excess. Stat. 1866, c. 23, § 1.

MISSISSIPPI. — Six per cent. is the legal rate, but parties may contract in writing for interest not exceeding ten per cent. A contract for more cannot be enforced. Rev. Code, 1871, § 2279.

MISSOURI. — Six per cent. is the legal rate, but parties may contract in writing for any rate not exceeding ten. Usury forfeits the interest at ten per cent. to the common schools. Judgments bear the same rate of interest as the contract, not exceeding ten per cent. Stat. 1870, p. 782, §§ 1, 3, 5.

MONTANA TERRITORY. — Ten per cent. is the legal rate, but parties may stipulate for any rate of interest. Codified Stat. 1872, c. 33, §§ 1-3.

NEBRASKA. — Ten per cent. is the legal rate, but parties may contract for a rate not exceeding twelve, but this may be taken in advance. Usury forfeits all interest. Rev. Stat. 1873, c. 34, §§ 1-5.

NEVADA. — Ten per cent. is the legal rate, but parties may contract in writing for any other rate. Comp. Laws, 1873, §§ 32, 33.

NEW HAMPSHIRE. — Six per cent. is the legal rate. Usury forfeits three times the excess. The principal and legal interest may be recovered. Gen. Stat. 1853; Acts 1872, c. 12, § 3.

NEW JERSEY. — Seven per cent. is the legal rate. Usury forfeits all interest. Rev. Stat. 1874, p. 356, §§ 1, 2.

NEW MEXICO TERRITORY. — Six per cent. is the legal rate, but the parties may agree upon any rate. Judgments bear the same rate as the obligation.

NEW YORK. — Seven per cent. is the legal rate. Usury makes void the con-

tract, note, bond, or mortgage, even in the hands of innocent third parties; but no corporation can plead the defence. Usury is also a misdemeanor punishable with a fine of one thousand dollars, or six months' imprisonment, or both. Banks are exempt from these penalties. Rev. Stat. 1875, p. 1164, §§ 1-20.

NORTH CAROLINA. — Six per cent. is the legal rate, but eight per cent. may be stipulated. Usury forfeits double the amount of the loan, and is indictable as a misdemeanor. Acts 1875, c. 84.

OHIO. — Six per cent. is the legal rate. Parties may contract in writing for eight. If a higher rate is contracted for, only the principal and six per cent. can be recovered. Judgments bear interest at rate of the contract. Stat. 1876, c. 1666, §§ 1, 3.

OREGON. — Ten per cent. is the legal rate, but parties may contract for twelve per cent. Usury forfeits the debt. Gen'l Laws, 1872, pp. 623, 624.

PENNSYLVANIA. — Six per cent. is the legal rate. Usurious interest cannot be collected, and if collected, may be recovered by suit brought within six months. Negotiable paper taken in good faith, in usual course of business, is not affected by the discount allowed upon it. Railroad and canal companies may sell their obligations below par without making the contract usurious. Dig. Laws, 1872, pp. 803, 804, §§ 1, 2, 4.

RHODE ISLAND. — Six per cent. is the legal rate, but the parties may agree upon any rate. Gen. Stat. 1872, c. 128.

SOUTH CAROLINA. — Seven per cent. is the legal rate. The parties may agree upon any rate. Rev. Stat. p. 292, §§ 5-6.

TENNESSEE. — Six per cent. is the legal rate. Parties may contract in writing for interest not exceeding ten per cent. Judgments bear interest at same rate as contract within this limit. If a higher rate is contracted for, the excess above six per cent. cannot be recovered. When usuri-

strict legal right, or when no interest at all was collectible at law, if the allowance was just and equitable.¹

But if a mortgage be given to secure a preëxisting debt, which was tainted with usury, the mortgage will be vitiated by the usury of the original indebtedness.² A mortgage given in renewal of one that is tainted with usury is itself affected with the same taint.³ And the consequences of the usury will attend the new security, even when this is given by a third person, if there be no other consideration than the original usurious debt. But there is no rule of law which makes it unlawful or usurious in one to loan money, to be used by the borrower in paying a usurious debt to another, if this loan be itself free from usury.⁴

Inasmuch as usury depends upon the intent with which it is taken, the court will look into the whole transaction to determine what the intent was, not only the acts of the parties at the time of the transaction but subsequently.⁵

A stipulation for the payment of interest at the highest rate allowed by law, at periods shorter than a year, whether semi-

ous interest has been paid, it may be recovered by action. Usury is also a misdemeanor punishable by indictment and a fine of not less than one hundred dollars. Stat. 1871, §§ 1944, 1945, 1948; Act 1869, c. 69, § 1.

TEXAS. — Legal rate is eight per cent. By contract twelve per cent. may be reserved. The excess is void. Dig. Laws, 1850, art. 1607, 1608, 1609; Constitution of 1875.

UTAH TERRITORY. — Ten per cent. is the legal rate. Parties may agree upon any rate. Laws 1868, c. 13, p. 15.

VERMONT. — Six per cent. is the legal rate. Anything above that cannot be recovered, or if paid, may be recovered back by suit. Gen. Stat. 1862, c. 79, §§ 3, 4; c. 67, § 1.

VIRGINIA. — Six per cent. is the legal rate. Usury forfeits all interest. The law does not apply to corporations. Acts 1874, c. 122.

WASHINGTON TERRITORY. — Ten per cent. is the legal rate, but any rate may be agreed upon. Judgments bear same rate as the contract. Stat. 1854, p. 380, §§ 1, 2.

WEST VIRGINIA. — Six per cent. is the legal rate. The excess cannot be recovered when usury is pleaded. This does not apply to corporations. Code, 1870, c. 96, §§ 4, 6.

WISCONSIN. — Seven per cent. is the legal rate. Parties may contract in writing for ten per cent. Usury forfeits all interest. Compound interest cannot be computed unless expressly agreed upon in writing. Gen. Laws, 1871, c. 93, § 2; and c. 43, § 1.

WYOMING TERRITORY. — Twelve per cent. is the legal rate, but any rate may be agreed upon. Comp. Laws, 1876, c. 63, §§ 1, 2.

¹ *Spencer v. Ayrault*, 10 N. Y. 202.

² *Bell v. Lent*, 24 Wend. (N. Y.) 230; *Vickery v. Dickson*, 35 Barb. (N. Y.) 96.

³ *McCraney v. Alden*, 46 Barb. (N. Y.) 272; see *Hoyt v. Bridgewater Copper Mining Co.* 2 Halst. (N. J.) 253, 625.

⁴ *Wilson v. Harvey*, 4 Lans. (N. Y.) 507.

⁵ *Bardwell v. Howe, Clarke* (N. Y.), 281; *Stelle v. Andrews*, 19 N. J. Eq. 409; see *Fox v. Lipe*, 24 Wend. (N. Y.) 164.

annually or quarterly, does not make the loan usurious.¹ Neither is the taking of interest at the highest rate allowed by law, in advance for a whole year, usurious.²

635. Attorney's fees. — A provision for the payment of damages to the amount of five per cent. of the loan, in case of a sale for a breach of the condition, is not usurious.³ It is in effect only a stipulation to allow compensation for extra and incidental trouble and expense in consequence of the sale; and a provision for the payment of the expenses of foreclosure, and a reasonable attorney's fee, is generally held valid and not obnoxious to the usury laws.⁴ Whenever the stipulation is for the payment of something which the court can see is a valid and legitimate charge or expense, it will be upheld; but if the stipulation be so indefinite that the court cannot tell whether the payment was intended to be for something legal or illegal, it will not be upheld. Accordingly it has been held that a stipulation for the payment, in case of foreclosure of the costs "and fifty dollars as liquidated damages for the foreclosure of the mortgage," is invalid.⁵ "What was the term 'liquidated damages,' in this mortgage, designed to cover? If it was designed to cover attorney fees, why did not the parties say so in the mortgage? If it was only designed to cover any legitimate charge or expense, why did they not say so? . . . If the damages were for usurious interest, then of course they could not be allowed."⁶

636. An agreement to pay the taxes on the mortgage debt in addition to interest has been held not to be usurious.⁷

637. Exchange. — When no place of payment is named in

¹ *Meyer v. City of Muscatine*, 1 Wall. 384; *Mowry v. Bishop*, 5 Paige (N. Y.), 98.

² *Tholen v. Duffy*, 7 Kans. 405, and cases cited.

³ *Siegel v. Drumm*, 21 La. Ann. 8; *Gambriel v. Rose*, 8 Blackf. (Ind.) 140; *Billingsley v. Dean*, 11 Ind. 31.

⁴ *Weatherby v. Smith*, 30 Iowa, 131; 6 Am. Rep. 663; *Parham v. Pulliam*, 5 Cold. (Tenn.) 497; *Clawson v. Munson*, 55 Ill. 394. In KENTUCKY, however, it is held

that a provision for the payment of an attorney's fee upon foreclosure is against public policy, and also usurious in its nature, and cannot be enforced. *Thomasson v. Townsend*, 10 Bush, 114; *Rilling v. Thompson*, 12 Ib. 114.

⁵ *Foote v. Sprague*, 13 Kans. 155; *Tholen v. Duffy*, 7 Kans. 405.

⁶ *Foote v. Sprague*, *supra*, per Valentine, J.; and see *Kurtz v. Sponable*, 6 Kans. 395; *Tholen v. Duffy*, 7 Kans. 405.

⁷ *Banks v. McClellan*, 24 Md. 62.

the mortgage, the debt is generally payable to the mortgagee wherever he may be found. If made payable at the place of residence of the mortgagor, for his accommodation, it is not usurious for him to allow the mortgagee the difference of exchange between the two places; unless it appear that this allowance was a mere device on the part of the mortgagee to evade the usury laws, and to obtain more than legal interest for the use of his money.¹

638. A mortgage to a building and loan association is not usurious, when under the articles of association, in addition to monthly payments of interest, the mortgagor is bound both by the mortgage, and as a member of the association, to pay certain fines and impositions.²

639. When there has been an absolute conveyance of land, with an agreement to repurchase within a fixed time, at a price exceeding that paid for it and interest, the transaction may be a conditional sale, in which case it is not affected with usury. If, however, the transaction be a mortgage, it is usurious. As already noticed, such a transaction is closely observed by the courts in order to prevent the creditor from depriving the debtor of the right of redemption, which should attach to it as a mortgage. The transaction is, moreover, suspicious, for the reason that it easily affords a ready cloak for usury. It will not, therefore, be sustained as a conditional sale, unless it clearly appears that it was in good faith intended as such, and not as a contrivance to cover usury.³

In a mortgage any agreement to pay more than the sum loaned and lawful interest is usury; and usury is constituted not only by the payment of money, but by any arrangement whereby the lender derives a profit or advantage beyond the interest allowed by law.⁴

Where the laws make usurious contracts void, any transaction which is in effect a mortgage, though called a sale by the parties, and is usurious in effect, is rendered invalid. The intent is deduced from the fact. If the mortgagee knowingly and volun-

¹ *Williams v. Hance*, 7 Paige (N. Y.), 581. *Ass'n v. Vandervere*, 3 Stockt. (N. J.) 382. See the last case for reasons.

² *Red Bank Mt. Build. & Loan Ass'n v. Patterson*, 27 N. J. Eq. 223; *Savings*

³ *Gleason v. Burke*, 20 N. J. Eq. 300.

⁴ *Gleason v. Burke*, *supra*.

tarily take or reserve a greater interest than is allowed by law, his security is thereby rendered void; though it is not if taken by mistake or accident. But aside from mistake or accident, evidence will not be allowed to show that the mortgagee did not intend to violate the statute.¹

In whatever way the transaction may be disguised, if it be in fact a loan at a usurious rate of interest, the security taken will be declared void.² The attempt is sometimes made to conceal usury under the guise of rent; as where a mortgage was given to secure a loan of \$3,000, without any agreement about interest; but the mortgagee leased the mortgaged premises to the mortgagor at an annual rent of \$270, which was held to be an agreement for usurious interest.³

640. The grantor not allowed to redeem without payment. But on the other hand, it is held that although a court of equity will allow a debtor to redeem, when to secure a loan of money he has made an absolute conveyance of land and taken an agreement to repurchase, yet he will not be entitled to any of the penalties or forfeitures given by the statute for usury, even when it is shown that this form of the transaction was used for the purpose of covering up an usurious rate of interest agreed upon between the parties. The debtor is entitled to a conveyance upon the payment of the original loan with legal interest; but having put the transaction into such a form that he is obliged to ask a court of equity for relief from the letter of the contract, which he could not obtain at law, the court will impose terms upon him to do equity.⁴

641. Sale of mortgage. — Although a valid mortgage once issued may be sold at a discount without involving the purchaser in any of the consequences of taking usurious interest,⁵ yet, if the

¹ *Fiedler v. Darrin*, 50 N. Y. 437. "The plaintiff doubtless hoped and intended to cover up his tracks, to conceal his loan and the reservation of usurious interest, under the weak guise of a purchase and resale, and could well have sworn that he did not intend to bring himself within the condemnation of the law. But he did in fact loan his money at an illegal interest,

and has failed in his attempt to evade the consequences." Per Allen, J.

² *Fitzsimons v. Baum*, 44 Pa. St. 32; *Birdsall v. Patterson*, 51 N. Y. 43; *Andrews v. Poe*, 30 Md. 486.

³ *Gordon v. Hobart*, 2 Story, 243.

⁴ *Heacock v. Swartwout*, 28 Ill. 291.

⁵ *White v. Turner*, 1 Hun (N. Y.), 623; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Low-*

mortgage be made without consideration and for the purpose of being sold, inasmuch as the subsequent sale gives it vitality, and is really the issuing of it, a sale at a discount has the same effect in rendering it void, as has the taking of a *bonus* by the mortgagee.¹ It would seem, however, that one purchasing a mortgage at a discount of the mortgagor's agent, in whose name the mortgage stood, without knowledge of the agency, would not incur any liability for usury.

On the other hand, a sale of mortgage securities at a premium by the mortgagee does not subject him to an action for the recovery of the premium on the ground of usury.²

642. If the agent of the mortgagee, in making the loan, exact a payment to himself by way of commission for making the loan, the loan is not necessarily rendered usurious.³ The payment in excess of legal interest can hardly affect the principal, when it is made without his knowledge and he derives no benefit from it. If, however, his agent should, even without his authority, exact such a payment, and he should afterwards receive the money, or any part of it, or should adopt any usurious contract made by the agent, he would doubtless be held liable to the consequences of the usury.⁴

So, on the other hand, it is held that the declarations of an agent, to whom a mortgage is made for the purpose of enabling him to borrow money for the mortgagor, that he owned the mortgage, and that it was given upon a previously existing indebtedness to him, if false and unauthorized, are not binding upon the mortgagor, and do not estop him to deny them, and set up the defence of usury.⁵

643. The burden of proof that a mortgage is usurious is upon the mortgagor. He is impeaching his own obligation formally executed under seal, and must establish the facts to constitute usury beyond a reasonable doubt. An even balance of

ett v. Dimond, 4 Edw. (N. Y.) Ch. 22; *Mix v. Madison Ins. Co.* 11 Ind. 117.

¹ *Vickery v. Dickson*, 62 Barb. (N. Y.) 272; and see *Walter v. Lind*, 16 N. J. Eq. 445; *Brooks v. Avery*, 4 Comst. (N. Y.) 225. See *Culver v. Bigelow*, 43 Vt. 249.

² *Culver v. Bigelow*, 43 Vt. 249.

³ *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 N. Y. 165.

⁴ *Estevez v. Purdy*, 6 Hun (N. Y.) 46; and see *Algur v. Gardner*, 54 N. Y. 360.

⁵ *New York Life Ins. & Trust Co. v. Beebe*, 7 N. Y. 364.

testimony is not sufficient; there must be a clear preponderance. It is a defence not favored in equity; and especially when the consequence is to forfeit the whole debt, the defence is considered unconscientious.¹ When the penalty is simply the forfeiture of the illegal interest, or of all interest, even, although the defence is not considered unconscientious, the rule of evidence, that the defence must be clearly made out, is applied both at law and in equity.²

In a mortgage for purchase money, the fact that the sum secured is greater than that named in the consideration of the conveyance to the mortgagor, with interest, is no evidence that the difference is usury.³

644. One claiming under the mortgagor may set up this defence. — It has sometimes been held that the defence of usury is so exclusively personal, that it could not be made by any one but the mortgagor; that a subsequent incumbrancer or purchaser cannot set it up.⁴ But this doctrine has been generally abandoned, and in its place has been adopted the rule that not only the mortgagor, but any person who is seised of his estate and vested with his rights, may interpose this defence, although a mere stranger cannot.⁵ Thus, a voluntary assignee of the mortgagor for the payment of his debts may set up usury in the mortgage.⁶ So may a judgment or execution creditor of the mortgagor;⁷ or a purchaser of the equity of redemption,⁸ unless he has assumed the payment of the mortgage, or bought subject to it,⁹ or a second

¹ *Conover v. Van Mater*, 18 N. J. Eq. 481.

² *Conover v. Van Mater*, *supra*.

³ *Vesey v. Ockington*, 16 N. H. 479.

⁴ *Baskins v. Calhoun*, 45 Ala. 582; *Sayre v. Fenno*, 3 Ala. 458; nor by mortgagor's wife claiming under a subsequent voluntary conveyance. *Cain v. Gimon*, 36 Ala. 168.

⁵ *Brolasky v. Miller*, 1 Stockt. (N. J.) 808; *Westerfield v. Bried*, 26 N. J. Eq. 357.

⁶ *Pearsall v. Kingsland*, 3 Edw. (N. Y.) 195.

⁷ *Carow v. Kelly*, 59 Barb. (N. Y.) 239; *Thompson v. Van Vechten*, 27 N.

Y. 568; *Dix v. Van Wyck*, 2 Hill (N. Y.), 522.

⁸ *Green v. Kemp*, 13 Mass. 515; *Bridge v. Hubbard*, 15 Mass. 96, 103; *Gunnison v. Gregg*, 20 N. H. 100; *Shufelt v. Shufelt*, 9 Paige (N. Y.), 137, 145; *Brooks v. Avery*, 4 N. Y. 225; *Berdan v. Sedgwick*, 44 N. Y. 626; *Bullard v. Raynor*, 30 N. Y. 197, 202; *Banks v. McLellan*, 24 Md. 62; *McAlister v. Jerman*, 32 Miss. 142; *Doub v. Barnes*, 1 Md. Ch. 127.

⁹ See *Sands v. Church*, 6 N. Y. 347; *Ferris v. Crawford*, 2 Denio (N. Y.), 598; *Stephens v. Muir*, 8 Ind. 352; *Wright v. Bundy* 11 Ind. 398.

mortgagee.¹ Any one in legal privity with the mortgagor, unless he has debarred himself of the right to dispute the mortgage, may set up this defence; otherwise the property would be practically inalienable in the hands of the mortgagor, unless he should be willing to affirm the usurious mortgage by selling the property subject to it. But the owner of the property has, of course, the right to sell the property as though such void mortgage did not exist; and the purchaser necessarily acquires all the rights of his vendor to question the validity of the usurious incumbrance.²

645. Subsequent certificate of validity.—A mortgagor is not estopped from setting up usury by reason of having executed, after the making of the mortgage, a covenant or certificate under seal that the mortgage was a valid and subsisting lien upon the premises described, unless an innocent third party is thereby induced to buy the mortgage, relying upon the statement. As against the mortgagee himself, or any assignee who knew the fact of usury, it would be without effect.

If a purchaser has notice of the usurious character of the instrument, he is not protected by such a certificate, although he relied upon it as a protection in law.³ The mortgagor may introduce evidence to show that the purchaser never believed, nor acted upon, the statements as true. He may show that the mortgagee shared in a very large fee, paid his attorneys in the matter of the loan, and that it was really a cover for usury.⁴

646. Usury cannot, generally, be set up after a foreclosure and sale.—Under usury laws which make void securities affected with usury, the question arises, what limit is there to the effect of the statute? Does a foreclosure of the mortgage and a sale of the mortgaged property to a third person terminate the right of the mortgagor to avail himself of the usury, or do the conse-

¹ *Greene v. Tyler*, 39 Pa. St. 361; *Waterman v. Curtis*, 26 Conn. 241. *Contra*, *Powell v. Hunt*, 11 Iowa, 430.

² Per Chancellor Walworth, in *Shufelt v. Shufelt*, *supra*.

³ *Wilcox v. Howell*, 44 N. Y. 398; *Eitel v. Bracken*, 38 N. Y. Superior Court, 7. In the former case the court, per Earl, C., said that the doctrine of equitable estoppel, being founded upon principles of

equity and justice, is only applied to conclude a party by his acts and admissions, when in good conscience he ought not to be permitted to gainsay them; and that it would be preposterous to hold that a party is estopped from claiming that the very instrument claimed to estop him was obtained by fraud.

⁴ *Van Sickle v. Palmer*, 2 Thomp. & C. (N. Y.) 612.

quences of it still attend the property so that the purchaser's title may be rendered void? If the effect of the usury survives the original transaction, in the words of Lord Kenyon,¹ "it might effect most of the securities of the kingdom; for if in tracing a mortgage for a century past, it could be discovered that usury had been committed in any part of the transaction, though between other parties, the consequence would be that the whole would be void. It would be a most damning proposition to the holders of all securities." This question was also answered by an early case in New York, in which Chief Justice Kent, delivering the opinion of the court, said: "The principles of public policy, and the security of titles, are deeply concerned in the protection of such a foreclosure. If the purchase was to be defeated by the usury in the original contract, it would be difficult to set bounds to the mischief of the precedent, or to say in what sequel of transactions, or through what course of successive eliminations, and for what time short of that in the statute of limitations, the antecedent defect was to be deemed covered or overlooked, so as to give quiet to the title of the *bonâ fide* purchaser. The inconvenience to title would be alarming and enormous. The law has always had regard to derivative titles, when fairly procured; and though it may be true, as an abstract principle, that a derivative title cannot be better than that from which it was derived, yet there are many necessary exceptions to the operation of this principle."²

After a foreclosure a mortgage contract is regarded as executed. So long as the contract remained executory, the mortgagor could avail himself of the usury; but when it is executed, and others have in good faith acquired interests in the property, the objection can no longer be raised. But if the mortgagee himself buy the property directly or through an agent at the foreclosure sale, it is held that his title may still be impeached for usury in the mortgage. Being a party to the usurious contract, his situation is no better after the foreclosure than it was before.³

647. A bonus paid to secure the extension of the time of

¹ Cuthbert v. Haley, 8 T. R. 390.

² Jackson v. Henry, 10 Johns. (N. Y.) 185, 197; and see Elliott v. Wood, 53 Barb. (N. Y.) 285.

³ Jackson v. Dominick, 14 Johns. (N.

Y.) 435; and see McLaughlin v. Cosgrove, 99 Mass. 4. So with any purchaser who has notice of the usury at the time of sale. Bissell v. Kellogg, 60 Barb. (N. Y.) 617.

payment of an existing mortgage does not invalidate the mortgage as a security for the original debt, but the amount paid should be applied as a payment on the mortgage debt.¹ When a mortgage is free from usury in its inception, no subsequent usurious contract in relation to it can affect the mortgage itself. It is only the subsequent contract that is affected by the usury.

An agreement after maturity of the mortgage debt to pay a rate of interest higher than is allowed by law, as an indemnity to the mortgagee for interest paid by him on money borrowed in another state at such higher rate, will not for that reason be upheld.²

648. Usury paid for extension to be credited on debt. — Under the usury laws, a payment made by a mortgagor to the holder of the mortgage, as a premium for an extension of the time of payment of the principal debt, being void for the purpose for which it was made, should be credited as a payment upon the mortgage debt as of the time when it was made.³

649. When agreement to extend is void for usury. — Under the usury laws in some states, it is held that an agreement to extend the time of payment of a mortgage is void, if made in consideration of a usurious payment or contract. But while the cases are in harmony upon this point, they are not agreed whether it is the privilege of the borrower alone to take advantage of the usurious taint of the contract; or whether, for instance, the lender may disregard the contract and proceed before the expiration of such extension to enforce payment or foreclose the mortgage. On the one hand it is held that the lender cannot wilfully violate the statute against usury, and then take advantage of his own wrong by repudiating the contract; that the borrower, or his surety, or personal representative, can alone set up the usury; in other words, that the victim of the usury, and not the usurer, can take advantage of the statute.⁴

¹ *Terhune v. Taylor*, 27 N. J. Eq. 80; *Real Estate Trust Co. v. Keech*, 7 Hun (N. Y.), 253, and cases cited; *Abrahams v. Claussen*, 52 How. (N. Y.) Pr. 241; *Langdon v. Gray*, Ib. 387; *Donnington v. Meecker*, 3 Stockt. (N. J.) 362; *Trusell v. Jones*, 23 N. J. Eq. 121; S. C. Ib. 554.

² *Eslava v. Lepretre*, 21 Ala. 504.

³ *Laing v. Martin*, 26 N. J. Eq. 93; *Trusdell v. Jones*, 33 Ib. 121, 554; *Nightingale v. Meginnis*, 34 N. J. L. 461; *Patterson v. Clark*, 28 Ga. 526.

⁴ *Billington v. Wagoner*, 33 N. Y. 31, and cases cited.

A distinction is however taken between a contract for extension founded upon a consideration of an actual payment of money made at the time of the contract, and one made upon an executory contract to pay usury; and it is held, that while the contract is binding upon the creditor in the former case, it is not binding in the latter; as for instance when the consideration for the extension is a promissory note of the debtor.¹

Extension of the time of payment is a sufficient consideration for an agreement to increase the rate of interest upon the debt, and when the arrangement has once been entered upon without a definite limitation of its continuance being agreed upon, it will be presumed that the increased rate of interest continues as long as the forbearance is granted.²

But, on the other hand, the true rule upon this subject is declared to be, that the court will not help either party to enforce a usurious contract while it remains executory.³

A promise to extend the time of payment of a mortgage made in consideration of a note for a usurious premium is void; and the mortgagee may foreclose it before the expiration of the extended time upon his giving up the usurious note. The usurious contract in such case remains executory, and the court will not help either party to enforce it. It is not the privilege of the borrower alone to take advantage of the usurious taint. The statute makes the contract void.⁴

2. *Compound Interest.*

650. An executory agreement for compound interest. — As to compound interest, the general rule is that an executory contract for it cannot be enforced; but that the payment of such interest by the debtor, understandingly and under no peculiar circumstances of oppression, does not constitute usury.⁵ It is admitted that there is no law prohibiting such a contract: but the courts have adopted the rule from notions of policy; holding that although it may be demanded and recovered as it becomes due,

¹ *Billington v. Wagoner*, 33 N. Y. 31; ³ *Jones v. Trusdell*, 23 N. J. Eq. 554; *Jones v. Trusdell*, 23 N. J. Eq. 554, per Chief Justice Beasley. S. C. Ib. 121.

² *Haggerty v. Allaire Works*, 5 Sandf. S. C. Ib. 121. (N. Y.) 230.

⁴ *Jones v. Trusdell*, 23 N. J. Eq. 555;

⁵ *Culver v. Bigelow*, 43 Vt. 249.

an agreement to pay interest on the interest after it becomes due cannot be enforced.¹

Lord Thurlow, said: ² "My opinion is in favor of interest upon interest; because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the court if I give it." Lord Eldon also said that a bargain for interest on interest was neither unfair nor illegal, but that it could not be allowed because it tended to usury, although it was not usury.³

In several states it is now provided by statute that interest upon interest may be contracted for;⁴ and it would seem that,

¹ *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13.

² In *Waring v. Cunliffe*, 1 Ves. Jun. 99.

³ *Chambers v. Goldwin*, 9 Ves. 271. See, also, *Blackburn v. Warwick*, 2 Y. & C. 92, per Alderson, B.; *Barnard v. Young*, 17 Ves. 47; *Leith v. Irvine*, 1 My. & K. 284; *Thornhill v. Evans*, 2 Atk. 330.

⁴ In MICHIGAN it is provided that when any instalment of interest upon any note, bond, mortgage, or other written contract, shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such instalment so due and unpaid, from the time at which it became due, at the same rate as specified in any such note, bond, mortgage, or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum. Com. Laws, 1871, § 1637.

In MISSOURI parties may contract in writing for the payment of interest upon interest; but the interest shall not be computed oftener than once in a year. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt. Wag. Stat. 1870, p. 783, § 6; *Waples v. Jones*, 62 Mo. 440.

In CALIFORNIA the parties may contract in writing, and agree that if the interest is not punctually paid it shall be-

come part of the principal and bear interest at the same rate. Civil Code, 1873, § 1919.

In WISCONSIN it is provided that interest shall not be compounded, or bear interest upon interest, unless there be an agreement to that effect, expressed in writing, and signed by the party to be charged therewith. Stat. 1871, p. 840, § 10.

ARIZONA. — Parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt. Acts 1864, p. 46, §§ 1, 4.

On the other hand, express provisions against compound interest have been made in a few states.

ARKANSAS. — In no case where a payment shall fall short of paying the interest due at the time of making such payment shall the balance of such interest be added to the principal. Stat. 1858, p. 623, § 11.

In LOUISIANA interest upon interest cannot be recovered, unless it be added to the principal, and by another contract made a new debt. No stipulation to that effect in the original contract is valid. Rev. Civil Code, 1870, art. 1939.

In IDAHO no person or corporation, in computing interest on any bond, bill, promissory note, or any other instrument in writing, shall add the interest, or any

inasmuch as the objection to such contracts has been that they savored of usury, and inasmuch as it has always been held that the parties may, by a new agreement after the interest has accrued, turn it into principal, in those states where the laws against usury have been abolished, there can be no reason why an agreement for turning interest into principal is not valid. But in Nevada, although it is provided by statute that parties may agree in writing for the payment of any rate of interest, it is held in equity that a contract for compound interest cannot be enforced.¹ The court say, that "when the Nevada statute was passed, it was the settled rule of courts of equity to refuse to allow compound interest, when their aid was invoked to collect a debt. In courts of law the rule was not so well settled, but we think a majority of the States of this Union, and the English courts of law, had refused to enforce that portion of contracts which provided for the collection of compound interest. None of these rulings were founded on the statutes against usury, but on the general principles of the common law, as it existed without reference to the usury law."

651. So long as the agreement for compound interest is **executory merely** the courts will not lend their aid to enforce it; but when the contract has been acted upon by the parties, and such interest has been paid, the courts will not require a repayment, nor will they hold the transaction to be in any degree tainted with usury, by reason of such payment. Such an agreement does not render a mortgage usurious, but the contract, so far as it provided for usurious interest, is void; but it may be enforced for the debt and interest, even where usury makes void the contract.² An agreement to pay interest on interest, made after the interest has accrued, is valid and may be enforced.³

Some recent decisions do away with this distinction, and hold that there is no objection to a contract for interest upon interest.⁴

In Ohio it is the settled rule, that when interest is payable by the terms of a mortgage at stated periods, without any special portion thereof due, to the principal, and

compute interest thereon as part of the principal, thereby charging compound interest. Rev. Laws, 1875, p. 647, § 6.

¹ Cox v. Smith, 1 Nev. 161.

² Mowry v. Bishop, 5 Paige (N. Y.), 98.

³ Tylee v. Yates, 3 Barb. (N. Y.) 222; Fobes v. Canfield, 3 Ohio, 18.

⁴ Hollingsworth v. City of Detroit, 3 McLean, 472; Scott v. Saffold, 37 Ga. 384.

agreement to that effect, it becomes principal from the time of payment, and may be recovered as such, with interest from the time it became due. Upon a note which simply provides for the payment of interest annually, the interest on the interest will be computed at the legal rate provided for cases where the parties do not agree upon a higher rate; and although the interest upon the note be fixed at a higher rate, in the absence of any agreement as to the rate of the interest upon accrued interest that rate will not govern.¹

But when interest on interest is stipulated for, the rate reserved by mortgage, if within the limits allowed by law, will control.²

652. Accrued interest is a debt; and even where an agreement made at the time of the loan for converting interest into principal, from time to time as it shall become due, is not allowed because it is regarded as offensive and usurious, yet when it has become due, there is no objection to the parties converting such interest into principal, and securing it by a further mortgage. It is regarded as in the nature of a further advance, and not only may it form the consideration of a second or further mortgage, but as between the parties it may be tacked to the first mortgage.³

When a mortgage is given to secure the payment of money in instalments, to commence at a future day, "with interest semi-annually," interest begins to run from the making of the contract. The holder may sue for each half year's interest as it becomes due, although the principal is not due.⁴

653. Interest coupons. — It is the general practice for corporations, in making mortgages upon their property, to attach to the mortgage bonds coupons representing the interest payable at the several times when the interest falls due;⁵ and this practice

¹ *Cramer v. Lepper*, 26 Ohio St. 59; 627; *Eslava v. Lepretre*, 21 Ala. 504; S. C. 20 Am. R. 756.

² *Watkinson v. Root*, 4 Ohio, 373; *Dunlap v. Wiseman*, 2 Dis. (Ohio) 398.

³ *Quimby v. Cook*, 10 Allen (Mass.), 32; *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Pinckard v. Ponder*, 6 Ga. 253;

Townsend v. Corning, 1 Barb. (N. Y.) 627; *Eslava v. Lepretre*, 21 Ala. 504; *Banks v. McClellan*, 24 Md. 62; *Fitzhugh v. McPherson*, 3 Gill (Md.), 408; *Hale v. Hale*, 1 Cold. (Tenn.) 233; *Parham v. Pulliam*, 5 Ib. 497.

⁴ *Connors v. Holland*, 113 Mass. 50; *Hastings v. Wiswall*, 8 Mass. 455.

⁵ *Harper v. Ely*, 70 Ill. 581; *Hollings-*

has been adopted in several states quite extensively by individuals, in making ordinary mortgages or trust deeds upon their private property. Such coupons providing for the payment of definite sums of money at specified times are in effect promissory notes, and are held to draw interest in the same manner after maturity.

Interest coupons, although detached from the bond, are still covered by the lien of the mortgage given to secure the bond.¹ Such coupons are usually payable to bearer, and may be transferred and presented by any holder.²

654. Provision for compound interest no waiver of right to enforce it as it matures. — A provision for the payment of interest annually, and that if not so paid it should be compounded, is no waiver of the right to enforce its payment when due; and if the deed further provides that upon a failure to pay the debt or interest as it matures, the whole shall become due and payable, upon a failure to pay the interest annually the whole debt or the interest only may be enforced at the creditor's election.³

655. Computation of interest. — When no payments have been made upon the mortgage, the interest should be computed from the date of the note until the rendition of the decree. It is erroneous to compute the interest to the time of maturity, and, adding it to the principal, then to compute it upon the gross amount to the time of rendering the decree.⁴

In computing interest upon a note with interest payable annually, intermediate payments made on account of the interest accruing, but not yet due, should be deducted at the end of the year, without any allowance of interest upon them; but rests should not be made at the time of such intermediate payments, as that would result in giving compound interest upon the loan.⁵

worth *v.* City of Detroit, 3 McLean, 472;
Gelpcke *v.* City of Dubuque, 1 Wall. 175,
206; Dunlap *v.* Wiseman, 2 Dis. (Ohio)
398; County Commissioners Columbia Co.
v. King, 13 Fla. 451.

¹ Miller *v.* Rutland, &c. R. R. Co. 40
Vt. 399.

² Sewall *v.* Brainerd, 38 Vt. 364.

³ Waples *v.* Jones, 62 Mo. 440.

⁴ Barker *v.* International Bank, 80 Ill.
96. See, also, Leonard *v.* Villars, 23 Ill.
377.

⁵ Townsend *v.* Riley, 46 N. H. 300.

3. *Conflict of Laws.*

656. The general rule undoubtedly is, that the law of the place where the contract is executed governs as to the construction and validity of it; but there is this well recognized exception to the rule, or qualification of it, that where the contract is to be executed in another place, then the law of the place of execution will govern.¹ When the mortgage debt is by its terms made payable in the state where the land is situated, though the mortgage was executed in another state, the contract, so far as it is personal, is to be interpreted by the laws of the place of performance.² But the place where the mortgage is made payable may be different from the place where the land is situated; and the mortgage may have been executed in still a third place, and the question arises, by what law is the mortgage then to be governed? "Obligations, in respect to the mode of their solemnization," says Mr. Wharton,³ "are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." Mr. Justice Hunt, in a recent case before the Supreme Court of the United States, after quoting the rule as above laid down, himself states it as follows: ⁴ "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

657. What law governs. — The validity of a contract secured by mortgage made in one state, upon lands in another state, depends, so far as the usury laws affect it, upon the question by the

¹ *Morgan v. New Orleans, &c. R. Co.* 2 Woods, 244; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226; *Little v. Riley*, 43 N. H. 109; *Parham v. Pulliam*, 5 Cold. (Tenn.) 497.

² *Duncan v. Helm*, 22 La. Ann. 418.

³ *Conflict of Laws*, § 401 *p.*

⁴ *Seudder v. Union Nl. Bank*, 91 U. S. 406.

law of which state is the contract itself governed? If the loan is to be repaid in the state where it is made, the contract would be governed by the laws of that state, even when secured by mortgage of land situate in another state.¹ If nothing be said about the place of payment, the contract is presumably payable where the parties reside and the contract is made, although the land be situated in another state; and the validity of the contract would be determined by the laws of the place of contract.² But the parties may contract with reference to the law of a state other than that where the land is situated, and if the note or mortgage be made payable in that state, the law of that state will govern in the construction and legal effect of the contract.³ The parties may stipulate for interest with reference to the laws of either the place of contract or the place of payment, so long as the provision be made in good faith, and not as a cover for usury.⁴

When a contract is made payable in another state for the purpose of evading the usury laws of the state where the contract is executed, the question is not which law shall govern in executing the contract, but which shall decide the fate of the security. Unquestionably it must be the law of the state where the transaction was had.⁵

By statute in Michigan, the interest on mortgages may be made payable out of the state at such place as the parties may agree upon, although the rate of interest in such place may be less than in this state; and the rate of interest reserved is not affected by the laws of the place where payment is to be made.⁶

658. But the laws of another state cannot be imported into a contract by a mere mental operation or understanding of the parties, for the purpose of making the character of the loan different from what it is under the law of the place of contract. A

¹ 3 Kent's Com. 460; Story's Conflict of Laws, §§ 287, 292, 293; *Cope v. Wheeler*, 41 N. Y. 303; 53 Barb. 350; 46 Ib. 272; *Newman v. Kershaw*, 10 Wis. 333; *Kennedy v. Knight*, 21 Wis. 340.

² *Cope v. Wheeler*, 53 Barb. (N. Y.) 350; aff'd 41 N. Y. 303; the action was for surplus money. And see *Williams v. Ayrault*, 31 Barb. (N. Y.) 364; *Williams v. Fitzhugh*, 37 N. Y. 444; *Blydenburgh v.*

Cotheal, 1 Halst. (N. J.) Eq. 631; *Dobbin v. Hewett*, 19 La. Ann. 513.

³ *Duncan v. Helm*, 22 La. Ann. 418; *Nichols v. Cosset*, 1 Root (Conn.), 294.

⁴ *Townsend v. Riley*, 46 N. H. 300; *Pecks v. Mayo*, 14 Vt. 38.

⁵ *Andrews v. Pond*, 13 Peters, 78; *Mix v. Madison Ins. Co.* 11 Ind. 117.

⁶ *Compiled Laws of Mich.* 1871, pp. 541, 542.

mortgage was made in New York, where both of the parties to it resided, of land situate in Wisconsin, and interest was reserved at the rate of twelve per cent., which was legal in the latter but not in the former state. The only pretext that the loan was made with reference to the law of Wisconsin was that the mortgagor had money due to her there at twelve per cent. interest, which the borrower there desired to retain, and therefore he was willing, and agreed to pay that rate for money borrowed in New York, to relieve temporary wants. But the loan being made in New York, where it was also to be repaid, and the use of the money being unrestricted, the reason why the borrower was willing to pay more than lawful interest was immaterial. The transaction was, therefore, governed by the laws of New York, under which the mortgage was usurious.¹ The same decision was reached in a case where the facts were substantially the same, except that the mortgagor resided in Ohio, where the mortgaged lands were situated. The mortgage was executed in New York, and was made payable there; and the contract was therefore governed by the laws of that state.² A like decision was made in Ohio with reference to a loan negotiated in the State of New York, where the money was advanced, and a note and mortgage payable there taken as security; although the mortgage covered lands in Ohio, it was held that the laws of the state of New York relating to usury were applicable to the transaction.

659. In some cases the law of the place of contract, rather than the law of the place of performance, has been held to prevail. — There are, however, some cases which hold that a contract made in a state where it is valid, to be performed in another where it would be invalid, may after all be held valid by referring it to the law of the state where it was made.³ The question which law shall govern depends upon the law applicable to the contract itself, and not upon the fact that the mortgage, considered alone, would be valid by the law of the state where the lands lie. “The place of payment may, in the absence of any more controlling circumstances, be sufficient to show that the parties intended to

¹ *Cope v. Wheeler*, 41 N. Y. 303; S. C. 53 Barb. 350; 46 Ib. 272.

² *Williams v. Fitzhugh*, 37 N. Y. 444; *Lockwood v. Mitchell*, 7 Ohio St. 387.

³ *Chapman v. Robertson*, 6 Paige (N. Y.), 627; *Fisher v. Otis*, 3 Chand. (Wis.) 83; S. C. 3 Pinn. (Wis.) 78; *Depau v. Humphreys*, 20 Martin (La.), 1.

refer their contract to the law of that place. But if the loan was actually made in another state, the money to be used there, the parties residing there, the security given there; and if by that law the contract would be valid, and it would be invalid by the law of the place of payment; these facts may well be held to have a stronger influence in showing the intention than the mere place of payment, and the rule itself resting upon that intention, where the intention is rebutted the rule should cease.”¹

660. The *lex rei sitæ* does not control. — The authorities generally do not regard the circumstance that the loan is secured by mortgage in determining whether it be usurious.² Thus a loan made in New Hampshire, upon land situated there, may be made payable in New York, and may provide for the payment of interest at the rate of seven per cent., being the rate allowed there, though this be a higher rate than that allowed by the laws of New Hampshire, if this arrangement be made in good faith, and not for the purpose of evading the laws of New Hampshire; and such mortgage with interest, at the rate so provided, will be enforced by foreclosure of the mortgage in New Hampshire.³ Although the mortgage be by express terms payable in New Hampshire, the parties may after its maturity agree that the interest shall be paid “as by law established in New York,” where the mortgagor then resided; and such agreement made in good faith will be enforced in New Hampshire. “It is true,” said Mr. Justice Bellows, “that in many cases interest may properly be regarded as a mere incident of the debt, and so payable only where the principal is payable; but this is by no means always the case, for by express stipulation the interest may become payable by itself, and a suit maintained for it before the principal becomes due, as in the case of a contract to pay interest annually; so in the case of bonds with coupons attached; and we see no objection

¹ *Newman v. Kershaw*, 10 Wis. 333, 340, per Paine, J.

² In *Connor v. Earl of Bellamont*, 2 Atk. 382, Lord Hardwicke allowed Irish interest upon a debt contracted in England, but secured by a bond and mortgage executed in Ireland. In *Stapleton v. Conway*, 3 Atk. 726, the same eminent judge said that if a contract is made in England

for a mortgage of a plantation in the West Indies, no more than legal interest shall be paid upon such mortgage; and a covenant in it to pay eight per cent. interest is within the statute of usury, notwithstanding that was the rate of interest where the land lies.

³ *Townsend v. Riley*, 46 N. H. 300.

to the parties being allowed to fix the amount of interest, and the time and place of payment of it, as they may all other particulars of the contract, provided it be done in good faith, and with no design to evade the usury laws.”¹

A mortgage made in Ohio, upon land in that state, but made payable in New York with interest at the rate of ten per cent., which is a legal rate in the former state but not in the latter, was treated as a contract made in Ohio with reference to the laws of that state, although the mortgagee resided in Connecticut and the loan was made by means of a draft paid in New York.²

A like decision was also made in Wisconsin, in a suit to foreclose a mortgage of lands situate in that state, made in New York, where the parties resided, and where the loan was made payable; therefore the laws of that state were held to govern the contract as to its validity and effect;³ but the decision would be otherwise in case the mortgage had been made payable in Wisconsin, or perhaps had been made there.⁴

But the courts of New York refused to declare void a mortgage made in Minnesota upon land in that state, with interest at the rate of twenty-five per cent. per annum, although the mortgage debt was made payable in New York; for the rate of interest was considered as fixed with reference to the place of contract.⁵

The law of the place of contract, or of the place of performance, determines the question whether the mortgage be valid or usurious, irrespective of the place where the land, which is the subject of the mortgage, is situated.⁶ The location of the land mortgaged may perhaps in some cases be considered in connection with the place of contract, or the place of performance, in determining whether the parties contracted with reference to the law of the one place or of the other; but on the authorities, this seems to be all the consideration that can be given to this circumstance.⁷

661. On the other hand, it is said that the remedy against the

¹ In *Townsend v. Riley*, *supra*.

² *Roclofson v. Atwater*, 1 Dis. (Ohio) 346.

³ *Newman v. Kershaw*, 10 Wis. 333.

⁴ *Kennedy v. Knight*, 21 Wis. 340.

⁵ *Balme v. Wombough*, 38 Barb. (N. Y.) 352.

⁶ *De Wolf v. Johnson*, 10 Wheat. 367;

Dolman v. Cook, 14 N. J. Eq. 56; *Campion v. Kille*, *Ib.* 229; *Andrews v. Torrey*, *Ib.* 355; *Varick v. Crane*, 3 Green (N. J.) Ch. 128; *Cothel v. Blydenburgh*, 1 Halst. (N. J.) Ch. 17, 631.

⁷ See *Newman v. Kershaw*, 10 Wis. 333; *Kennedy v. Knight*, 21 Wis. 340.

mortgagor personally may be pursued wherever the debtor may be, and therefore suit may be brought against him in a state other than that in which the mortgaged premises are; but that the lien upon the land can be enforced only in the state where the land is situated. The *lex fori* and the *lex rei sitæ* in this respect must always be the same. It is moreover a well settled principle that title to real property must be acquired agreeably to the law of the place where it is situated. This principle applies to mortgages as well as to absolute conveyances;¹ and of course the remedy to enforce the lien must be sought where the property is. The validity of a mortgage, it is declared, must therefore be determined by the law of the state where the mortgage land is, wherever the deed may be executed or the mortgage debt made payable.²

In regard to these cases it is to be observed that *Hosford v. Nichols* was decided upon the ground that the contract was in fact executed in New York, where the land was situated, and therefore is no authority for the position that the law of the place where the land is situated, rather than the law of the place of contract, governs as to usury. The later case of *Chapman v. Robertson* has often been criticised, and, so far as it holds that the *lex rei sitæ* governs as to usury, it has been repeatedly overruled by the later cases in New York.

A person residing in New York being in England, there negotiated a loan upon the security of a bond and mortgage upon lands in New York, at the legal rate of interest in that state. It was arranged that upon the return of the borrower to New York he should execute and record the mortgage, and that upon the receipt of it in England the mortgagee should deposit the money

¹ *Hosford v. Nichols*, 1 Paige (N. Y.), 220, per Walworth, Chancellor; see *Van Schaick v. Edwards*, 2 Johns. Cas. (N. Y.) 355.

² In support of this position are cited the cases in the last note and the following: *Goddard v. Sawyer*, 9 Allen (Mass.), 78, cited and approved in *Sedgwick v. Laffin*, 10 Ib. 430, 432, per Gray, J.; *Lyon v. McIlvaine*, 24 Iowa, 9.

In *Goddard v. Sawyer*, *supra*, a mortgage was made in New Hampshire, where both parties resided, of land in Massachu-

setts, to indemnify the mortgagee against a liability to arise subsequently. Such a mortgage being invalid under the laws of New Hampshire, this invalidity was set up to an action in Massachusetts to foreclose the mortgage. The court — Metcalf, J., delivering the opinion — say: "The question as to the validity of the mortgage in this case is to be decided by the law of this state, within which the mortgaged premises are situate, and not by the law of New Hampshire where it was executed, and where the parties thereto resided.

with the mortgagor's bankers in London for his use. This was done accordingly. The mortgage was usurious under the laws of England; but it was held in a suit to foreclose the mortgage that the usury laws of England could not be set up in defence. Chancellor Walworth said: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this case, I have arrived at the conclusion that the mortgage executed here, and upon property in this state, being valid by the *lex situs*, which is also the law of the domicile of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon lands here."¹

Then as to the case of *Goddard v. Sawyer* in Massachusetts, that does not relate to the contract but rather to the form and validity of the instrument itself. The learned judge who gives the opinion refers to a case before the Supreme Court of the United States, holding that title to land by devise can be acquired only under a will duly approved and recorded, according to the law of the state in which the lands lie, and in which Mr. Justice Washington says: "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." Another reference in the Massachusetts case is to an earlier case in that state, the principal bearing of which upon the case before the court is in the statement of the principle, that "the title to and disposition of real estate must be exclusively regulated by the law of the place in which it is situated." The conclusion therefore is, that although there are some statements which would seem to support the position, that the question of usury in a mortgage executed and made payable in a state other than that where the land is situated is to be determined by the laws of the state where the land is situate, there is really no authority for this position.²

662. But as to the form and validity of the mortgage deed

¹ Chapman v. Robertson, 6 Paige (N. Y.), 627.

² The only other case referred to is Hosford v. Nichols, *supra*.

as a conveyance, the law of the place where the land is situated must always govern. Thus, if the laws of the state where the lands are situate recognize the validity of a mortgage by the deposit of the title deeds by a debtor with his creditor, then the laws of that state govern as to the lien, although the transaction be had in another state.¹ But if such a mortgage be not recognized in the state where the lands are, the fact that a deposit is made in a state or country where a mortgage in this form is recognized will not enable the creditor to enforce it against the lands. And so if the laws of a state prohibit the making of a mortgage to secure future advances or liabilities, a mortgage in this form, of land in that state, would not be recognized there, although made in a state where such a mortgage would be valid; and on the other hand, such a mortgage made in the former state where it would not be valid, but covering lands in a state where such a mortgage is valid, would be enforced in the latter state, because it is a valid conveyance there.²

663. The laws of another state must be pleaded and proved. To avail of the usury laws of another state, as a ground for defence, they must be distinctly set up in the answer, and at the hearing must be proved as matters of fact.³ Under an answer setting up usury without any more specific allegation, and without any averment showing that the contract is governed in this respect by the laws of another state, the defence is limited to the statutes against usury of the state where the action is pending.⁴ Until otherwise proved, the laws of another state, in regard to usury, will be presumed to be the same as the *lex fori*.⁵

The law in force at the time of the delivery of a mortgage governs its validity or construction, so far as these are affected by statute.⁶ A mortgage made in Alabama during the civil war was enforced in the courts of that state, acting under the Constitution and laws of the United States after the close of the war, although the consideration of it was a loan of Confederate treas-

¹ Griffin v. Griffin, 18 N. J. Eq. 104.

4; Hosford v. Nichols, 1 Paige (N. Y.),

² Goddard v. Sawyer, 9 Allen (Mass.), 220.

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⁴ Champion v. Kille, *supra*.

³ Champion v. Kille, 14 N. J. Eq. 229; Dolman v. Cook, *Id.* 56; Andrews v. Torrey, *Id.* 355; Klinck v. Price, 4 W. Va.

⁵ Van Auken v. Dunning, 81 Pa. St. 464.

⁶ Olson v. Nelson, 3 Minn. 53.

ury notes,¹ on the ground that it was valid under the government *de facto* which then existed.

A stay law, making void and of no effect all mortgages and deeds of trust for the benefit of creditors thereafter executed, whether registered or not, does not apply to a mortgage executed prior to the passage of the act, but registered after its passage.² Being valid when made, it is not competent for the legislature afterwards to make it invalid.³ A mortgage made at a time when there is no statute limiting the rate of interest is a valid security, although the rate of interest be extortionate; and its validity is not affected by a subsequent statute or change in the constitution of the state limiting the rate of interest.⁴

¹ Scheible v. Bacho, 41 Ala. 423, and cases cited. See to the contrary, however, Stillman v. Looney, 3 Cold. (Tenn.) 20.

² Harrison v. Styers, 74 N. C. 290.

³ Harrison v. Styers, *supra*.

⁴ Newton v. Wilson, 31 Ark. 484; Jacoway v. Denton, 25 Ark. 625.

CHAPTER XV.

A MORTGAGOR'S RIGHTS AND LIABILITIES.

Introductory.—The nature of a mortgage was considered in the first chapter, and some of the rules and statutes were there stated which determine in large part the rights and liabilities of the parties. The rights of the parties with reference to particular matters have been considered in other chapters. In fact the whole treatise relates, in some form, to the rights or liabilities of either the mortgagor or mortgagee; but in this and the following chapters it is proposed to treat of the general relations of the parties to each other and to third persons; but inasmuch as their relations to a purchaser of the equity of redemption, to a lessee of the mortgaged property, and to an assignee of the mortgage, present many important questions in respect to each, special chapters will be given to the consideration of these.

1. *As to Third Persons.*

664. His right of possession as against third persons.—The owner of the equity of redemption is entitled to possession as against every one except the mortgagee and those claiming under him, and may, as against any others, maintain a real action to recover possession.¹ Against all other persons he has the same rights respecting the mortgaged premises that he ever had.² He may, so far as his interest goes, deal with it in every respect as the owner. He may devise it, sell it, or lease it, or make any contracts in respect to it.³ His conveyance is so far a conveyance of the land that the covenants real are annexed to it, and pass with it to the grantee and his assigns.⁴ The wife of a mortgagor is entitled to dower, and the husband of a mortgagor to curtesy in

¹ *Huckins v. Straw*, 34 Me. 166; *Stinson v. Ross*, 51 Me. 556; *Bird v. Decker*, 64 Me. 550; *Ellison v. Daniels*, 11 N. H. 274; *Hall v. Lance*, 25 Ill. 277; *Doe v. M'Loskey*, 1 Ala. 708.

² *Orr v. Hadley*, 36 N. H. 575; *Wilkins v. French*, 20 Me. 111; *Chamberlain v. Thompson*, 10 Conn. 243.

³ *Kennett v. Plummer*, 28 Mo. 142.

⁴ *White v. Whitney*, 3 Met. (Mass.) 81.

the mortgaged premises. The equity of redemption is subject to attachment, and to sale upon execution by the mortgagor's creditors. He has the remedies of an owner as against every one, except the mortgagee, who interferes with his possession or enjoyment of the land. At common law, as between the mortgagor and mortgagee, the legal title is in the latter, and so remains even after the debt is paid, if it be not paid till after the law day.¹ But no one can avail himself of this title but the mortgagee; and therefore, in case of an action of ejectment brought by a second mortgagee against the mortgagor, the latter cannot set up the legal title of the prior mortgagee as a defence. The fact that he has such an interest in the land as will enable him to redeem, can make no difference. Until he does redeem, he is a stranger to the legal title.² The fact that the mortgagor has paid since the law day, but has taken no discharge, constitutes no defence to an action of ejectment.³

So long as he remains in possession, and does not commit waste, he may lawfully dispose of the products of the land.⁴ He may recover damages for waste committed by a stranger, in cutting and removing trees and lumber manufactured from them.⁵ As against the mortgagee he is entitled to receive the rents and profits of the mortgaged land, and to take the emblements, without being liable to account. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor; but except as to such remedies, and as to all persons but the mortgagee, a mortgagor in possession is to be regarded and treated as the owner of the estate, subject merely to a lien or charge.⁶ The legal title passes by the mortgage merely for the purpose of giving the mortgagee the full benefit of the security.⁷

After possession has been taken by the mortgagee for the purpose of foreclosure, the mortgagor cannot maintain an action of

¹ *Chamberlain v. Thompson*, 10 Conn. 243; *Cross v. Robinson*, 21 Conn. 379; *Smith v. Vincent*, 15 Conn. 1; *Toby v. Reed*, 9 Conn. 216; *Cooch v. Gerry*, 3 Har. (Del.) 280.

² *Savage v. Dooley*, 28 Conn. 411.

³ *Doton v. Russell*, 17 Conn. 146.

⁴ *Kimball v. Lewiston Steam Mill Co.* 55 Maine, 494.

⁵ *Bird v. Decker*, 64 Me. 550.

⁶ *Willington v. Gale*, 7 Mass. 138; *Taylor v. Porter*, 7 Mass. 355; *Goodwin v. Richardson*, 11 Mass. 469, 473; *Snow v. Stevens*, 15 Mass. 278; *Eaton v. Whiting*, 3 Pick. (Mass.) 484, 488; *Blanchard v. Brooks*, 12 Ib. 47; *Fay v. Cheney*, 14 Ib. 399; *Clark v. Reyburn*, 1 Kas. 281; *Collins v. Torrey*, 7 Johns. (N. Y.) 278.

⁷ *Glass v. Ellison*, 9 N. H. 69.

tort against a stranger for using it as a way. There being no injury to the reversionary interest, the mortgagee is the only party entitled to maintain such action.¹

665. The equity of redemption of the mortgagor may be sold on execution. —The mortgagee may enforce against it an execution obtained upon a debt not secured by the mortgage.² The levy of an execution by any other creditor, or the sale under it, does not affect the rights of the mortgagee.³ Although by consenting to a sale of the mortgaged property, or to a levy upon it, without reference to his mortgage, he may debar himself from asserting his title afterwards.⁴

If no account be taken of the mortgage in making the levy, the interest of the debtor, and nothing more, passes by the proceedings.⁵ The debtor, in such case, has no occasion to complain.⁶

After a sale upon execution the mortgagor has no rights in the land unless he redeems it, or unless the judgment upon which the execution was issued be reversed.⁷

Inasmuch as an absolute deed with a bond for reconveyance constitute an express mortgage, the property is subject to levy and sale upon execution under a judgment against the grantor.⁸

If a mortgagee be in possession of the mortgaged premises after condition broken, a sale under execution against the mortgagor does not divest him of possession, or enable the purchaser to recover possession in an action of ejectment. His only remedy is to redeem.⁹

In some states the laws provide for a sale of the debtor's right of redeeming mortgaged land, while land not covered by a mortgage can only be taken by a levy and set-off in the usual way, and is not the subject of sale on execution. Where such is the law, if one owning a tract of land in fee mortgages a life estate, the reversion is not covered by the mortgage, and therefore his

¹ Sparhawk v. Bagg, 16 Gray (Mass.), 583.

² Cushing v. Hurd, 4 Pick. (Mass.) 253.

³ Febeiger v. Craighead, 4 Dall. 151; Crow v. Tinsley, 6 Dana (Ky.), 402; Cotten v. Blocker, 6 Fla. 1.

⁴ Grace v. Mercer, 10 B. Mon. (Ky.) 157; Smith v. Sweetser, 32 Me. 246.

⁵ Dunbar v. Starkey, 19 N. H. 160.

⁶ Perrin v. Reed, 35 Vt. 2.

⁷ Delano v. Wilde, 11 Gray (Mass.), 17.

⁸ Clinton Nl. Bank v. Manwarring, 39 Iowa, 281.

⁹ Hall v. Tunnell, 1 Houst. (Del.) 320; Dadmun v. Lamson, 9 Allen (Mass.), 85.

title to it is not an equity of redemption, and cannot be sold as constituting a part of his equity of redemption. When the life estate expires, the equity of redemption expires with it. If the mortgage is foreclosed, the reversion remains. If the equity is sold on execution, the reversion remains. No interest not covered by the mortgage passes by the sale.¹

The sale is valid though there be a right of homestead in the debtor, and the sale is not expressly made subject to it. The sale is necessarily subject to that right, and whether declared so or not it is immaterial.²

If land subject to a mortgage be attached, and afterwards the mortgagee sells the land under a power of sale for more than enough to pay the mortgage debt and the expenses of sale, the attaching creditor may, by a bill in equity brought within the time the land would have been held as security to satisfy the judgment, enforce his lien against the surplus remaining in the hands of the mortgagee.³ His claim has preference over a second mortgage made after the attachment. The surplus after the sale belongs to the same persons the land belonged to before the sale. No means being provided by statute for enforcing the creditor's lien against the funds, equity will afford a remedy, to the same effect and upon the same conditions as nearly as may be, as in proceedings at law in like cases.⁴

666. The widow of the mortgagor is entitled to dower in an equity of redemption, although she has released her right in the mortgage.⁵ She cannot maintain an action for it against the mortgagee, yet if the mortgage is not foreclosed, she is allowed in equity to redeem the mortgage, and then take her dower.⁶ She is entitled to dower in the whole estate as against every one but the mortgagee, but to redeem the land from him, she must pay the whole amount due on the mortgage.⁷ If, however, the mort-

¹ *Lafin v. Crosby*, 99 Mass. 446.

² *Swan v. Stephens*, 99 Mass. 7.

³ *Wiggin v. Heywood*, 118 Mass. 514.

⁴ *Per Gray, C. J.*, in *Wiggin v. Heywood*, *supra*.

⁵ Otherwise in England, where dower is a legal estate. *Story's Eq. Jur.* § 629; *Kent, C.*, in *Titus v. Neilson*, 5 Johns. (N. Y.) Ch. 452; *Snow v. Stevens*, 15 Mass.

⁶ *Eaton v. Simonds*, 14 Pick. (Mass.)

98; *Van Dyne v. Thayer*, 14 Wend.

(N. Y.) 233; *Hitchcock v. Harrington*, 6

Johns. (N. Y.) 290; *Collins v. Torrey*, 7

Ib. 278; *Coles v. Coles*, 15 Ib. 319; *Haw-*

ley v. Bradford, 9 Paige (N. Y.), 200;

Swaine v. Perine, 5 Johns. (N. Y.) Ch. 491.

⁷ *McCabe v. Bellows*, 7 Gray (Mass.),

148, and cases cited.

gage be discharged by any other party in interest, the widow of the mortgagor is let into her dower in the unincumbered estate ; as where the purchaser of the equity of redemption, on an execution sale, afterwards paid the amount due on the mortgage and claimed an assignment of it from the mortgagee, but the mortgagee declaring that an assignment was unnecessary, discharged it upon the margin of the record ; it was held that this discharge operated to extinguish the mortgage, and not as an equitable assignment of it, and that therefore the widow was dowerable in the land free from the incumbrance of the mortgage.¹

If a purchaser pays off a mortgage to which the right of dower would be subject, when he is under no obligation to pay the mortgage debt, and takes an assignment of the mortgage, his mortgage title will prevent an assignment of dower in the whole estate ;² and even if the mortgage be discharged and not in form assigned to him, he may in some cases be held to have redeemed the mortgage.³ But if the mortgage debt be paid by the debtor, or from his property, or in his behalf, such payment is a discharge of the mortgage, and dower can be assigned in the whole property ;⁴ and the payment is in behalf of the debtor, when he in any manner furnishes the means of payment, or imposes an obligation on the purchaser to assume and pay the debt as his own. In such cases an assignment of the mortgage amounts to a discharge, and the legal title under the mortgage merges in the equity.⁵

If an heir or devisee give a bond conditioned to pay all the debts of the deceased, and he take an assignment of a mortgage of a part of the real estate to himself, it would seem that he could not stand upon his mortgage title, and by foreclosure defeat the widow's estate of dower and homestead ; because the bond in this case may be regarded as supplying the place of the assets which would otherwise have been derived from the sale of the lands ;⁶ and certainly in such case if dower in the mortgaged premises had already been assigned to the widow, with the assent of the heir or

¹ *Eaton v. Simonds*, 14 Pick. (Mass.) 98 ; *Wedge v. Moore*, 6 Cush. (Mass.) 8. See chapter xx. on "MERGER."

² *Strong v. Converse*, 8 Allen (Mass.), 557 ; *Newton v. Cook*, 4 Gray (Mass.), 46.

³ See chapter xx. on "MERGER"

⁴ *Holmes v. Holmes*, 3 Paige (N. Y.),

363 ; *Bolton v. Ballard*, 13 Mass. 227 ; *Brown v. Lapham*, 3 Cush. (Mass.) 551, 554.

⁵ See chapter xx. on "MERGER." *McCabe v. Swap*, 14 Allen (Mass.), 188, per Wells, J.

⁶ *King v. King*, 100 Mass. 224.

devisee, he could not set up his mortgage title under the assignment or foreclosure against the dower estate.¹

2. *As to the Mortgagee.*

667. The mortgagor's right of possession as against the mortgagee. — Except in those states where the mortgagor is by statute confirmed in his possession until foreclosure, unless the mortgage contains a covenant or agreement, allowing the mortgagor to remain in possession until a breach of condition occurs, he is really a tenant at will, and may be ejected by the mortgagee without notice; or the mortgagee may at any time enter and dispossess him, or may recover possession by a writ of entry.² Yet, while the mortgagor is left in possession, he is in most respects regarded as the owner of the land, and he may occupy and improve, or may take the rents and profits to his own use, in the same manner as before he made the mortgage. The commencement of an action against him by the mortgagee to recover possession does not change his rights in this respect, and he is not accountable for the rents and profits accruing afterwards, and before the mortgagee is entitled to possession under the judgment. If the mortgagee wishes to receive the rents and profits, he must take early means to obtain possession.³

But the mortgagee cannot, before actually taking possession, give another person any right to the possession of the premises, to the exclusion of the owner of the equity of redemption.⁴

The making of the mortgage deed, and the subsequent possession of the mortgagor, furnish no presumption of a license from the mortgagee to the mortgagor to remain in possession.⁵ If both

¹ *King v. King*, *supra*.

² See §§ 11, 15; *Keech v. Hall*, 1 Dougl. 21; *Rockwell v. Bradley*, 2 Conn. 1. In this case the point is fully discussed. *Brown v. Cram*, 1 N. H. 169; *Hartshorn v. Hubbard*, 2 N. H. 453; *Simpson v. Ammons*, 1 Binn. (Pa.) 175; *Smith v. Shuler*, 12 S. & R. (Pa.) 240; *Martin v. Jackson*, 27 Pa. St. 504; *Youngman v. Elmira, &c. R. Co.* 65 Pa. St. 278.

³ *Wilder v. Houghton*, 1 Pick. (Mass.) 87. "As to the mortgagor," says Lord Hardwicke, in *Mead v. Lord Orrery*, 3 Atk. 244, "I do not know of any instance where he keeps in possession, that he is liable to

account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession." And again, in *Higgins v. The York Buildings Company*, 2 Atk. 107, the same judge said: "Upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor."

⁴ *Silloway v. Brown*, 12 Allen (Mass.), 30; *Mayo v. Fletcher*, 14 Pick. (Mass.) 531.

⁵ *Wakeman v. Banks*, 2 Conn. 445.

the mortgagor and mortgagee be living together in possession of the premises after condition broken, it is not a case of mixed possession, as between tenants in common, but the possession is in one or the other; and in which it is, is a question of fact for the jury to determine.¹

An affirmative covenant that the mortgagee shall retain possession of the premises with power to take the rents and profits until default, with a limitation of time beyond which his possession shall not extend, amounts to a redemise. But a redemise is not to be inferred from a covenant, that the mortgagor will not sell or lease until after notice.²

The mortgagor's reservation of the right of possession seldom extends his right beyond a breach of the condition by him; and therefore, except in those states in which by statute the mortgagee has no right of possession before foreclosure, he may immediately, upon default, take possession.³

When the mortgagee is entitled to possession, and brings an action to recover it, the mortgagor cannot defend on the ground that the mortgage was made to defraud creditors. He is not allowed to annul his own conveyance, under which a perfect legal title has passed to the mortgagee.⁴

668. His right of possession may be implied from the nature of the condition, as where a mortgage provided that he should occupy and cultivate a farm, and deliver to the mortgagee one half of the produce of it. By accepting an estate with such a condition, the mortgagee is as much estopped from claiming possession as he would have been if he had agreed by indenture that the mortgagor should retain exclusive occupation. If, before default, the mortgagor's possession be disturbed by entry of the mortgagee, except for the purpose of taking away his own share of the produce, he is liable in an action of trespass.⁵ So, also, if a mortgagee take a lease of the premises from the mortgagor, and covenant to pay him rent until the condition be broken, this amounts

¹ *Doe v. Tunnell*, 1 Houston (Del.), 320.

⁴ *Brookover v. Hurst*, 1 Metc. (Ky.)

² *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. 225.

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³ *Pierce v. Brown*, 24 Vt. 165; *Pratt v. Skolfield*, 45 Me. 386; *Stevens v. Brown*, Walk. (Mich.) 41; *Hill v. Robertson*, 24 Miss. 368.

⁵ See §§ 80, 389; *Flagg v. Flagg*, 11 Pick. (Mass.) 475; *Hartshorn v. Hubbard*, 2 N. H. 453; *Flanders v. Lamphear*, 9 N. H. 201; *Rhoades v. Parker*, 10 N. H. 83; *Lamb v. Foss*, 21 Me. 240.

to an agreement that the mortgagor shall retain possession, and receive the profits to his own use.¹ A provision in the mortgage, that the mortgagee may enter after default, implies that the mortgagor is entitled to possession until such default.²

A stipulation, that upon default the mortgagee may take possession and receive the rents and profits until the mortgage debt shall be paid, may be enforced by the mortgagee's taking possession and holding it; but the mortgagor is entitled to have the property again at any time upon paying the mortgage debt.³

An express stipulation is not necessary to enable the mortgagor to retain possession until a breach of the condition, when the very purpose of the instrument is such, that the mortgagor cannot fulfil his covenants without the possession of the property; as for instance when the purpose is to secure an agreement to support.⁴

The agreement that the mortgagor may remain in possession need not be in the mortgage itself, but may be contained in a separate paper, as for instance the mortgage note.⁵

The mortgagor's right of possession until breach of the condition is implied from a condition that the mortgagor shall support the mortgagee during his life, or shall deliver to him a certain portion of the produce annually.⁶ By taking possession in such case the mortgagee would prevent the mortgagor's carrying into effect the purpose for which alone the mortgage was made.⁷

669. The mortgagor's right of possession as modified by statute.—It has already been noticed that in several states the common law doctrine of the relation between the mortgagor and mortgagee is wholly done away with, and the mortgagee cannot obtain possession of the mortgaged premises, even after condition broken, except by purchasing them on a foreclosure suit.⁸ Even the foreclosure decree and sale under it do not divest the mortgagor of his right of possession; this is not lost till the deed under the sale is delivered to the purchaser. If the premises are

¹ *Newall v. Wright*, 3 Mass. 138.

² *Smith v. Taylor*, 9 Ala. 633.

³ *McIntyre v. Whitfield*, 21 Miss. (13 Sm. & M.) 88. And see *Hyman v. Kelly*, 1 Nev. 179.

⁴ *Soper v. Guernsey*, 71 Pa. St. 219.

⁵ *Clay v. Wren*, 34 Me. 187.

⁶ *Norton v. Webb*, 35 Me. 218; *Brown v. Leach*, 35 Me. 39; *Clay v. Wren*, 34 Me. 187; *Lamb v. Foss*, 21 Me. 240.

⁷ *Wales v. Mellen*, 1 Gray (Mass.), 512. That he may enter immediately. See *Colman v. Packard*, 16 Mass. 39.

⁸ See §§ 17-56.

occupied by tenants, the mortgagor may collect the rents until the purchaser is entitled to enter under his deed.¹ An exception to this rule is made in case the property is shown to be inadequate to meet the mortgage debt, in which case the court may appoint a receiver of the rents and profits pending proceedings to foreclose.²

Where the mortgagor is by statute protected in his possession until foreclosure, his possession is a matter of right, and not of sufferance, as it is at common law, except when assured to him by express agreement.³

670. The mortgagor's rights to the rents and profits.— So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate.⁴ He is not liable for rent. His contract is to pay interest and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right, he cannot claim the profits.⁵ Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. If he neglect to do this, the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earnings in the mean time. The sale under the decree, except where statutes provide otherwise, wholly divests him of title, and consequently of right to possession.

These principles are the same whatever may be the subject of the mortgage. Although the mortgage be given by a railroad company, and by its terms includes not only its property and franchises, but also "the tolls, rents, and profits to be had, gained, or levied therefrom," but it is implied from the mortgage that the company is to hold possession and receive the earnings of the road until the mortgagees take it, or the proper judicial authority

¹ *Gelston v. Burr*, 11 Johns. (N. Y.) 482; *Astor v. Turner*, 11 Paige (N. Y.), 436; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Mitchell v. Bartlett*, 52 Barb. (N. Y.) 319.

² *Post v. Dorr*, 4 Edw. Ch. 412; *Lofsky v. Maujer*, 3 Sand. Ch. 69.

³ *Crippen v. Morrison*, 13 Mich. 23;

Ladue v. Detroit, &c. R. Co. 13 Mich. 380; *Kidd v. Temple*, 22 Cal. 255; *Hopper v. Wilson*, 12 Vt. 695.

⁴ *Boston Bank v. Reed*, 8 Pick. (Mass.) 459; *Mayo v. Fletcher*, 14 Ib. 525; *Noyes v. Rich*, 52 Me. 115.

⁵ *McKinn v. Mason*, 3 Md. Ch. 186.

should interpose; the possession, so long as it is continuous, gives the right to receive the income of the road, and to apply it to the general purposes and debts of the company. So long as the company is allowed to receive the income of the road, it is within its discretion to decide what shall be done with it. The mortgage does not affect the application of it. If the mortgagees want it they must take possession of the road, or, pending a bill to foreclose the mortgage, apply for the appointment of a receiver.¹ Upon the appointment of a receiver, he cannot maintain a suit to recover earnings of the road in the hands of an agent, which accrued before the receiver's appointment.²

In like manner, if the mortgage be of leasehold premises, and the mortgagor hold over after breach of the condition, the law does not imply an obligation on his part to pay rent previous to an entry by the mortgagee.³

671. Whether the mortgagor is liable for rent after the mortgagee's entry to foreclose.—It seems to be an open question whether, in the absence of any agreement for payment of rent, a mortgagee, after entry to foreclose, may maintain an action against his mortgagor for use and occupation.⁴ Such an action certainly cannot be maintained after the foreclosure has been completed, if the premises are then worth more than the debt and interest secured by the mortgage; for a completed foreclosure is payment of the mortgage debt, in contemplation of law, if the value of the estate is equal to or greater than the whole sum due.⁵ If the mortgagee be not satisfied, he may recover any deficiency; and on this ground he might recover rents previously due from the mortgagor. "A foreclosure," said Mr. Justice Wells,⁶ "would not, of itself, prevent recovery of rents previously due from the mortgagor. But such a recovery against him would be held to operate, like a recovery of part of the mortgage debt, specifically to open the foreclosure. Perhaps, in a suit for rents, it might not be necessary for the plaintiff to show affirma-

¹ *Gilman v. Ill. & Miss. Tel. Co.* 91 U. S. 603. See *Pullan v. C. & C. Air Line R. Co.* 5 Biss. 237.

² *Noyes v. Rich*, 52 Me. 115.

³ *Mayo v. Fletcher*, 14 Pick. (Mass.)

525.

⁴ *Morse v. Merritt*, 110 Mass. 458; *Merrill v. Bullock*, 105 Mass. 486.

⁵ *Morse v. Merritt*, 110 Mass. 458.

⁶ In *Morse v. Merritt*, *supra*.

tively that the land was insufficient in value for the full payment of the mortgage debt. The mortgagor's rights would all be secured by the opportunity to redeem thus afforded him. In this case, however, it appears by the report that, at the time of the contemplated foreclosure, the value of the estate was greater than the whole sum due to the mortgagee, and that the mortgagee has sold and conveyed the estate; so that he ought to be precluded from opening the foreclosure, or denying the sufficiency of the payment. The amount due to him upon his mortgage was ascertained by the decree upon the bill to redeem. No deduction was then made on account of the sums which he now seeks to recover. If they had been collected when they became due, as is claimed, the amount required for redemption by the decree would have been reduced by so much. He can have no better right now to collect it for his own use, without applying it to the relief of the mortgage, than he had before the foreclosure."

Although after a breach of the condition of the mortgage, the holder of it having the legal title, and the right of present possession, may, if he sees fit, exercise this right, and he will thereupon become entitled to all the damages that may be done to the possession; yet if without taking possession under his mortgage he flows the mortgaged land, by means of a mill-dam upon other land belonging to him, such flowing is not an exercise of any right of possession or of ownership. It is not the exercise of any possession under the mortgage. The injury is an incidental result of the exercise of his riparian rights annexed to other lands. So long as the mortgagor is suffered to remain in possession he is entitled, by virtue of that possession, to the damages, notwithstanding the person who caused the flowing is the holder of a mortgage upon the premises flowed.¹

The mortgagee becomes entitled to recover and receive the damages from the time he takes possession, at which time the right of the mortgagor ceases. But the mortgagor may afterwards recover for damages suffered while he was in possession.² The fact, therefore, that the defendant has taken an assignment of the mortgage, is no defence to the mortgagor's right to maintain an action for such damages, so long as, by the terms of the

¹ *Vaugh v. Wetherell*, 116 Mass. 138;
Paine v. Woods, 108 Mass. 160.

² *Vaugh v. Wetherell*, 116 Mass. 138;
Walker v. Oxford Woollen Manuf. Co.
10 Met. (Mass.) 203.

mortgage, the holder of the mortgage is restricted from the right of possession.¹

672. A mortgagor does not hold adversely to the mortgagee. — His possession is at common law consistent with the right and title of the mortgagee. But a mortgagor may, by his declarations and acts, repudiate the mortgage, deny the title or right claimed under it, and convert his holding into an adverse holding. So may the grantee of the mortgagor.² The possession of a mortgagor, after a foreclosure sale, is presumed to be in subordination to the title of the purchaser; and the statute of limitations does not run in his favor; ³ and the same may be said of his possession after a decree of strict foreclosure, and the expiration of the time of redemption.⁴ He is a tenant at sufferance of the mortgagee.⁵

The possession of the mortgagor is so far that of the mortgagee that the latter may purchase, while such possession continues, an outstanding title or lien for his own protection, and hold it as paramount to his mortgage title, notwithstanding a statute making void a purchase of land which is at the time in the actual possession of another claiming adversely.⁶

673. The mortgagor's remedy to recover possession of the mortgagee after payment is in equity. — If a mortgagee who has entered for condition broken refuses, after payment of the debt, to relinquish possession, the remedy of the mortgagor is by bill in equity; and this is his only remedy.⁷ If ejectment would lie in such case, the mortgagee would have no remedy to recover for disbursements made by him for repairs; for his right to demand these depends upon the rules of equity, and not those of common law, under which the mortgagee is considered as the absolute owner.⁸ If on a bill by the mortgagor to recover possession, it appears that there is a balance due from the mortgagee to him, he cannot have judgment and execution for such balance, but must

¹ *Vaugh v. Wetherell*, *supra*.

² *Jamison v. Perry*, 38 Iowa, 14.

³ *Seeley v. Manning*, 37 Wis. 574, and
see *Wright v. Sperry*, 25 Wis. 617.

⁴ *Tucker v. Keeler*, 4 Vt. 161.

⁵ *Tucker v. Keeler*, *supra*.

⁶ *Wright v. Sperry*, 25 Wis. 617; and
see *Walthall v. Rives*, 34 Ala. 91, 97.

⁷ *Wilson v. Ring*, 40 Me. 116.

⁸ See chapter xxii. on "REDEMPTION."
Parsons v. Welles, 17 Mass. 419; *Hill v. Payson*, 3 Mass. 560. *Contra*, see *Blanchard v. Kenton*, 4 Bibb (Ky.), 451.

proceed at law.¹ And when one claiming under the mortgagor has not been made a party to a bill in equity to foreclose a mortgage, so that he is not bound by the proceedings, he cannot maintain ejectment against a purchaser at the foreclosure sale ; his only remedy is by a bill to redeem.²

The mortgagee in possession after condition broken, until a discharge of the mortgage or a reconveyance, retains the legal estate, although the mortgage debt may have been paid or satisfied, and although he could not maintain an action to recover possession, because no conditional judgment could be entered ; yet being in possession, he could not be dispossessed in an action at law. The only remedy against him is in equity.³

674. A mortgagor cannot maintain ejectment against the mortgagee in possession so long as there is any question whether the mortgage debt has been paid in full, or there remains any question of account to be settled between the parties.⁴ He must resort to a bill to redeem. That is the only way in which an account can be settled ; so that even when the mortgagee has in fact received rents and profits from the premises sufficient to satisfy the debt, he can be compelled to apply them to the payment of it only by a suit in equity. Neither can the mortgagor maintain a writ of entry against the mortgagee, or his assignee in possession, after condition broken ; as before stated, his remedy is in equity only.⁵

675. A mortgagor cannot maintain trespass against the mortgagee, or any one holding under him, after entry for condition broken, although the mortgage debt be in fact paid, if it be not released.⁶ Neither can a mortgagor who is not entitled by the terms of the mortgage, on a fair construction of it, to retain possession, maintain trespass against a mortgagee for entering and carrying away a fixture.⁷ And even before condition broken,

¹ *Taylor v. Townsend*, 6 Mass. 264.

⁵ *Woods v. Woods*, 66 Me. 206.

² *Friscie v. Kramer*, 16 Ohio, 125.

⁶ *Howe v. Lewis*, 14 Pick. (Mass.) 329 ;

³ *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390.

Parsons v. Welles, 17 Mass. 419 ; *Taylor v. Townsend*, 8 Mass. 411.

⁴ *Beach v. Cooke*, 28 N. Y. 508 ; *Edwards v. Farmers' Fire Ins. & Loan Co.* 21 Wend. 467 ; 26 Ib. 541 ; and see *Dougherty v. Kereheval*, 1 A. K. Marsh. (Ky.) 38.

⁷ *Chellis v. Stearns*, 22 N. H. (2 Fost.) 312 ; see *Mooney v. Brinkley*, 17 Ark. 340.

when the possession is not either expressly or impliedly secured to the mortgagor by the mortgage deed, he cannot maintain trespass against the mortgagee for entering and harvesting the crops growing upon the land. The gist of the action is unlawful entry; but the entry of the mortgagee in such case is lawful.¹ Yet the objection that trespass will not lie by a mortgagor against a mortgagee does not hold, when it is shown that the mortgagor is in possession under an agreement which makes him a tenant of the mortgagee.²

676. A mortgagor has a perfect right to convey his equity of redemption or any interest in it; and although he thereby obliges the mortgagee to make his grantees parties to a suit to foreclose the mortgage, his conveyances cannot be considered fraudulent against the mortgagee as tending to hinder and delay him.³ Of course the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons,⁴ whether by deed, or by confession of judgment,⁵ or otherwise. The mortgagor's assignee has no greater rights than the mortgagor himself; and the construction of the mortgage is the same in every respect, whether the mortgagor has conveyed the equity of redemption or not.⁶ Neither can the mortgagor and his grantee, by any subsequent arrangement between themselves, affect the mortgagee's lien, or prevent its operating to the full extent conferred by the mortgage.⁷

3. *His Personal Liability to the Mortgagee.*

677. An admission or recital of indebtedness in a mortgage will not create a personal liability by implication, unless it be express and unequivocal.⁸ The mere recital of the consideration is not sufficient to create such liability.⁹ Lord Chancellor Hardwicke said of such a mortgage, that "there did not appear to be any contract, either express or implied, for the payment of this mortgage

¹ *Gilman v. Wills*, 66 Me. 273; *Larkey v. Holbrook*, 11 Met. (Mass.) 458.

² *Marden v. Jordan*, 65 Me. 9.

³ *Hodson v. Treat*, 7 Wis. 263; *Buchanan v. Monroe*, 22 Tex. 537.

⁴ *Ellithorp v. Dewing*, 1 D. Chip. (Vt.) 141.

⁵ *Flanagan v. Westcott*, 11 N. J. Eq. (3 Stock.) 264.

⁶ *Kruse v. Scripps*, 11 Ill. 98.

⁷ *Hartley v. Harrison*, 24 N. Y. 170; *Frost v. Shaw*, 10 Iowa, 491.

⁸ *Shafer v. Bear River, &c. Mining Co.* 4 Cal. 294.

⁹ *Henry v. Bell*, 5 Vt. 393.

money.¹ Although there be, in addition to the recital of consideration, a statement in the condition "that this grant is intended as security for the payment of five hundred dollars and interest," no admission of indebtedness creating a personal liability is implied.² The fact that the mortgage provides for a policy of insurance as additional security, or that it contains a power of sale to be exercised on default, or that it contains the usual clause in regard to the possibility of a surplus after sale, providing that it shall be paid to the mortgagor, does not impart any admission to the other recitals.³ A recital that the mortgagor was indebted to the mortgagee in a certain sum, which should have been paid on the first day of January preceeding, was held to be a covenant to pay money, and that an action of debt would lie for it.⁴ A stipulation in a mortgage given to secure a note, that "general execution shall not issue therein," limits the remedy to the mortgaged property.⁵ A stipulation in a mortgage given by a corporation to secure its bonds, that the trustees should sell the property at the request of the holders of \$100,000 of its bonds when due, does not prevent an action by any bondholder upon the bonds after maturity.⁶

678. No covenant to pay implied.—In several states it is provided by statute that no mortgage shall imply a covenant for the payment of the sum secured; and that when there is no express covenant for such payment, and no separate obligation for the debt, the remedy of the mortgagee is confined to the lands mortgaged.⁷ Under such a statute when the mortgage contains no express covenant to pay the debt secured, and no bond, note, or other separate instrument has been given for it, an action cannot be maintained upon a verbal agreement to pay the debt. The remedy is limited to the land described in the mortgage.⁸

¹ *Howel v. Price*, 1 P. Wms. 292; *Coleman v. Van Renssalaer*, 44 How. (N. Y.) Pr. 368, where several cases are examined; and the case of *Chase v. Ewing*, 51 Barb. (N. Y.) 597, is criticised. See, also, *Culver v. Sisson*, 3 N. Y. 264; *Turk v. Ridge*, 41 N. Y. 201.

² *Severance v. Griffith*, 2 Lans. (N. Y.) 38; *Coleman v. Van Renssalaer*, *supra*.

³ *Coleman v. Van Renssalaer*, *supra*.

⁴ *Couger v. Lancaster*, 6 Yerg. (Tenn.) 477.

⁵ *Kennion v. Kelsey*, 10 Iowa, 443.

⁶ *Philadelphia, &c. R. R. Co. v. Johnson*, 54 Pa. St. 127.

⁷ CALIFORNIA: Civil Code, § 2928.

NEW YORK: 2 R. S. 1875, p. 1119.

OREGON: Gen. Laws, 1874, p. 516.

MINNESOTA: Rev. 1866, c. 40, § 6.

⁸ *Van Brunt v. Mismar*, 8 Minn. 232.

But a note, or bond, or other separate obligation already given for the payment of a debt, is not merged or extinguished by giving a mortgage, or a deed of land in the nature of a mortgage, for the same debt.¹ The mortgage or deed becomes merely collateral security for the payment of the prior obligation. If a new note or bond for the same amount be given, the result may be otherwise.²

The recitals in a mortgage, in regard to the indebtedness secured, may not be evidence that such indebtedness already exists. They may refer to an indebtedness contemplated by the parties; and are always open to explanation.³ They may refer to a past indebtedness for which there is no personal liability on the part of the mortgagor, when, of course, the mortgage gives no remedy beyond a resort to the property mortgaged.⁴ But although the recitals in the mortgage may be competent evidence against the mortgagor to prove the consideration of the note,⁵ yet when negotiable, the note must be produced before judgment, unless its loss or destruction be shown.⁶

4. *After acquired Titles and Improvements.*

679. Subsequently acquired title of mortgagor.—It is a well settled rule of law, that a title subsequently acquired by the mortgagor enures to the benefit of the mortgagee by virtue of the covenants in his mortgage, and is subject to foreclosure; and a subsequent purchaser from the mortgagor under his after acquired title, having notice of such mortgage, stands in no better position than the mortgagor himself.⁷ Neither can the heirs of the mortgagor claim the benefit of the subsequent title as against the mortgagee, when the mortgagor himself could not do so.⁸ Where one having a claim to land in Missouri, under a Spanish grant, made a

¹ *Ligget v. Bank of Pa.* 7 S. & R. (Pa.) 218; *Shaw v. Burton*, 5 Mo. 478; *Williamson v. Andrew*, 4 Har. & M. (Md.) 482.

² *Hall v. Hopkins*, 14 Mo. 450.

³ *Keeler v. Keeler*, 11 N. J. Eq. (3 Stock.) 458; *Ellis v. Messervie*, 11 Paige (N. Y.), 467.

⁴ *Hone v. Fisher*, 2 Barb. (N. Y.) Ch. 559.

⁵ *Warner v. Brooks*, 14 Gray (Mass.), 107.

⁶ *Chewning v. Proctor*, 2 McCord (S. C.) Ch. 11.

⁷ *Tefft v. Munson*, 63 Barb. N. Y. 31; *Hitchcock v. Fortier*, 65 Ill. 239; *McCrackin v. Wright*, 14 Johns. 194; *King v. Gilson*, 32 Ill. 318; *Gochenour v. Mowry*, 33 Ill. 331; *Jones v. King*, 25 Ill. 388.

⁸ *Somes v. Skinner*, 3 Pick. (Mass.) 52, 58; *Wark v. Willard*, 13 N. H. 389.

mortgage, and afterwards Congress confirmed the claim, it was held that the confirmation enured to the benefit of the mortgagee rather than to the benefit of his heirs solely.¹ In California it is declared by the Code that a title subsequently acquired by the mortgagor enures to the mortgagee as security, in like manner as if acquired before the execution.²

One in possession of land under a contract of purchase has a mortgageable interest.³ If he makes a mortgage with covenants of warranty, and afterwards acquires the legal title to the property, he is estopped to deny that he had title at the time of the mortgage. A recital in the mortgage, that the premises are the same conveyed to the mortgagor by the person who is the vendor in the contract of sale, will estop him from denying the validity of the mortgage after he has received such a conveyance. The covenants of warranty, in a deed to him by the vendor, relate only to incumbrances created by him, and not to those created by the grantee; and therefore would not estop the vendor from enforcing the mortgage, although he became the owner of it before the giving of the deed.⁴

680. A mortgagor cannot by acquiring a tax title upon the land defeat the lien of the mortgagee.⁵ It is his duty to pay the taxes, and he is not allowed to acquire a title through his own default. The same obligation rests upon one who has purchased the land of the mortgagor. When the taxes are paid by one who has merely a lien upon the land, there is of course no obligation upon him to pay the taxes; and although he may acquire the tax title for the protection of his own lien, he is not allowed to set up that title to defeat a prior lien. The land is regarded as a common fund for the payment of both liens, and equity regards it as an act of fraud for him to acquire a title to the land for an inconsiderable sum, and use it to destroy the claim of the prior mortgagee to the land.⁶

- It is a general rule that any one interested in land with others, all deriving their title from a common source, will not be per-

¹ *Massey v. Papin*, 24 How. 362.

² Civil Code, § 2930; Amendments, 1874, p. 260.

³ *Crane v. Turner*, 7 Hun (N. Y.), 357.

⁴ *Judd v. Seekins*, 62 N. Y. 266.

⁵ *Fuller v. Hodgdon*, 25 Me. 243; *Fair v. Brown*, 40 Iowa, 209; *Stears v. Hollenbeck*, 38 Iowa, 550; *Porter v. Lafferty*, 33 Iowa, 254. See § 77.

⁶ *Fair v. Brown*, 40 Iowa, 209.

mitted to acquire an absolute title to the land by a tax deed, to the injury of the others. The mortgagor, or any holder of the equity standing in his place as a purchaser or second mortgagee, cannot set up such title against the prior mortgagor.¹ The taking of the tax title in such case is regarded *primâ facie* merely as a redemption of the land from the tax sale. But a mortgagor for purchase money, who has acquired a tax title which the mortgagee by his covenants was bound to remove, may set up as an offset in a foreclosure the amount he was compelled to pay for the title.²

As already noticed, the mortgagee may acquire and maintain title to the premises paramount to the mortgagor, by purchase at a sale for taxes or under a prior judgment lien.³

If a mortgage containing covenants of warranty be foreclosed, the mortgagor, by buying the property at a tax sale for delinquent taxes on the land existing at the time of the mortgage, cannot defeat the title of the mortgagee, or of the purchaser under the foreclosure.⁴

681. Improvements are subject to the mortgage. — Improvements made with the consent of the owner, upon land subject to a mortgage by one who has notice of it, become subject to the mortgage in the same manner as if they had been made by the mortgagor himself. If a corporation, having the power to take the land by condemnation, make improvements before exercising this power, the mortgagee cannot be deprived of the benefit of the improvements by allowing the corporation to redeem the land by paying the value of the land when it took possession.⁵ It is negligence on the part of the corporation to proceed with improvements without first either obtaining a release of the mortgage, or condemning the interest of the mortgagee if it has that power. The corporation stands in the relation of a purchaser with notice of the mortgage, it being duly recorded, and it cannot have an advantage as to improvements which the mortgagor would not have had. There is no good reason for discriminating in its favor. To give a purchaser, with such notice, this right would enable him to obtain from the mortgagee, by means of the improve-

¹ *Smith v. Lewis*, 20 Wis. 350; *Avery v. Judd*, 21 Wis. 262.

² *Eaton v. Tallmadge*, 22 Wis. 526.

³ § 672; *Sturdevant v. Mathier*, 20 Wis. 576.

⁴ *Porter v. Lafferty*, 33 Iowa, 254.

⁵ *Booraem v. Wood*, 27 N. J. Eq. 371.

ments, a compulsory release at the value of the land at the time of taking possession.¹

The mortgagor is not entitled, as against the mortgagee, to be allowed for improvements made by him on the mortgaged property.²

Neither have persons furnishing labor and materials for such improvements any claim upon the mortgagee, without proof of a direct or implied promise on his part.³

682. Mortgagor estopped to deny his title.—A mortgagor by a mortgage containing the usual covenants of seisin and warranty is estopped to deny the title of the mortgagee,⁴ and he is as much estopped to deny the title of a subordinate mortgagee as to deny that of the first.⁵

Where a mortgage intended for the security of the school funds was executed to the commissioner of that fund, after the office was abolished, it was held that the mortgagor was estopped to deny the official character of the grantee, and that effect should be given the instrument.⁶

The mortgagor in such case will not be heard to say, in contradiction of his covenant of warranty, that he had not title at the date of the conveyance, or that it did not pass to his mortgagee by virtue of his deed.⁷ Where an owner of land made a second mortgage with covenants of warranty, and the first mortgagee entered and authorized the mortgagor to occupy, and died intestate, leaving the mortgagor his heir, it was held that the mortgagor was not entitled to possession as against the second mortgagee, either under the authority of the first mortgagee, because such authority was revoked by his death, or by descent from the first mortgagee, because he was estopped by the covenants of his mortgage.⁸

683. Mortgagor estopped to deny the validity of mortgage in the hands of one whom he has induced to buy it.—The doctrine of equitable estoppel is also applied against a mortgagor who has induced another to take an assignment of the mortgage

¹ *Booraem v. Wood*, *supra*.

⁶ *Floyd County v. Morrison*, 40 Iowa,

² *Childs v. Dolan*, 5 Allen (Mass.), 319. 188; *Franklin v. Twogood*, 18 Iowa, 516.

³ *Holmes v. Morse*, 50 Me. 102.

⁷ *Tefft v. Munson*, 57 N. Y. 97.

⁴ *Cross v. Robinson*, 21 Conn. 379.

⁸ *Lincoln v. Emerson*, 108 Mass. 87.

⁵ *Wires v. Nelson*, 26 Vt. 13; *Bailey v.*

Lincoln Academy, 12 Mo. 174.

from the holder of it, upon the representation that it is a good and valid security, to prevent his assailing its validity in the hands of such assignee. Having by word or act induced another to part with his money for the security, he is not allowed to repudiate the truth of his representation, and escape the payment of the obligation, by showing as between himself and the former holder of it that it was invalid.¹

One who has made a mortgage to a third person to secure notes payable to his own order, which he has delivered to the mortgagee without indorsement, thereby admits that the notes are valid securities for the payment of money.²

Only the parties to a mortgage, and those in privity with them, are bound by or can take advantage of an estoppel created by it.³ That the estoppel cannot bind others is apparent enough, and it is only a little less apparent that one is not bound to all the world to make good what he has said in his deed to the other party to it, even if others have relied upon his recital.⁴

5. *Waste by Mortgagor.*

684. Waste by mortgagor may be restrained by injunction. A mortgagor in possession, who is about to cut timber or commit other waste on the land, to an extent calculated to render the security inadequate, may be restrained by injunction; and it is not necessary to allege or prove his insolvency.⁵ Whether the mortgage be regarded as passing the legal estate, or as giving merely a lien for the debt, seems not to be regarded by the courts in giving this remedy against impairing the security.⁶ That a

¹ *Bush v. Cushman*, 27 N. J. Eq. 131, *per Van Fleet*, V. C. "No reference to books is necessary in vindication of a principle so clearly fundamental in every system of laws framed to promote justice. I refer to the following authorities simply to show how the doctrine has been applied:" *Martin v. Righter*, 2 Stockt. (N. J.) 525; *Lee v. Kirkpatrick*, 1 McCarter (N. J.) 267; *Den v. Baldwin*, 1 Zab. (N. J.) 403.

² *Hartwell v. Blocker*, 6 Ala. 581.

³ *Bigelow on Estoppels*, 269.

⁴ *Merston v. Merston*, 9 Bush (Ky.), 633.

⁵ *Eden on Injunction*, p. 119; 2 Story Eq. Jur. § 915; *Goodman v. Kine*, 8 Beav. 379; *Usborne v. Usborne*, Dick. 75; *Hip-*

pesley v. Spencer, 5 Madd. 422; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Adams v. Corrison*, 7 Minn. 456; *Fairbank v. Cudworth*, 33 Wis. 358. In *Bunker v. Locke*, 15 Wis. 635, the complaint averred the insolvency of the mortgagor; but the necessity of the averment was not passed upon. In *Robinson v. Russell*, 24 Cal. 467, the acts complained of were the removal of fruit from trees, and of growing nursery stock; and the court held the averment of the mortgagor's insolvency to be necessary, on the ground that the mischief was not irreparable.

⁶ *Brady v. Waldron*, 2 Johns. (N. Y.) Ch. 148; *Salmon v. Clagett*, 3 Bland. Ch.

mortgagee has the legal estate may be one ground for the interference of a court of equity in this way; but the right of the mortgagee to be protected in his security is a ground for such interference, whether he has the legal title or not.

In some states an injunction to restrain waste is the only remedy. In Connecticut it is held that until a decree of foreclosure, and the expiration of the time limited for redemption, the mortgagor is not liable in an action at law for waste, in cutting and carrying away wood and timber, or fixtures, or parts of buildings; but that the mortgagee's remedy is by an injunction in equity, to restrain the mortgagor from impairing the security.¹

In states where the possession of the mortgaged premises is by statute assured to the mortgagor until foreclosure, the mortgagee has no right to take possession of timber cut therefrom, whether it be upon the premises or not; nor can he maintain an action to recover the possession of such timber. He may, perhaps, have an action for damages against a person who wrongfully and knowingly impairs his security; but this is an uncertain remedy, as compared with that afforded by an injunction restraining the commission of waste; or as compared with the remedy afforded by actions at law for the recovery of the property removed from the mortgaged premises,² in states where the mortgagee has the legal title and right of possession.

A vendee in possession under a contract of purchase occupies in some respects the position of a mortgagor, and he may be enjoined in the same manner as a mortgagor from committing waste.³

Not only may an injunction against waste of the mortgaged property be had on the application of the mortgagee, but also upon the application of any one who stands in the relation of a surety of the mortgage debt, and who is either liable personally for its payment, or whose property is liable, by reason of being embraced in the mortgage. He has a right to protect the principal fund from being impaired, and to save himself from consequent loss.⁴

Instead of permanently enjoining a mortgagor from cutting

(Md.) 126; *Nelson v. Pinegar*, 30 Ill. 473.

³ *McCaslin v. The State*, 44 Ind. 151.

¹ *Cooper v. Davis*, 15 Conn. 556.

⁴ *Knarr v. Conaway*, 42 Ind. 260, 265; *Johnson v. White*, 11 Barb. (N. Y.) 194.

² *Adams v. Corrison*, 7 Minn. 456.

timber, the court may under some circumstances allow him to cut it, upon his securing the mortgagee for the value of it; as for instance where pine woodland had been burnt over, and it was proper, both for the permanent benefit of the estate, and in order to save the burnt wood, that this should be cut off, the mortgagor was allowed to proceed to do so, after security had been given for the value of the wood, as fixed by a reference ordered by the court.¹

685. An injunction will not ordinarily be extended to restrain the removal of timber already cut. — It then ceases to be part of the realty, and being converted into personal property, trover will lie for it. To prevent a multiplicity of suits, the courts, in granting an injunction to stay the commission of waste, have sometimes as an incident to that decreed an account for waste already done.² “It would seem, then,” says Chancellor Kent,³ “to be a stretch of jurisdiction, to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. . . . There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under shelter of it. Perhaps, in that and like cases, while the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber.”

686. It is not the duty of a mortgagee to enjoin waste. But although it is the right of a mortgagee, or of a purchaser of the equity of redemption of a part of the mortgaged property, to enjoin the committing of waste, it is not the duty of either of them to do so; and a purchaser of a part of the mortgaged property cannot require an account from the mortgagee of waste committed upon other portions of the property by the mortgagee or others, and an allowance of the damage done in part satisfaction of the mortgage debt.⁴ Such purchaser standing in the position

¹ *Brick v. Getsinger*, 5 N. J. Eq. (1 Halst.) 391.

³ *Watson v. Hunter*, 5 Johns. (N. Y.) Ch. 169.

² *Jesus College v. Bloom*, 3 Atk. 262; *Garth v. Cotton*, 1 Ves. 528.

⁴ *Knarr v. Conaway*, 42 Ind. 260.

of a surety of the mortgage debt might himself obtain such injunction.

687. A mortgagee entitled to possession may maintain trespass for waste. — A mortgagee not in actual possession may, after condition broken, where he has the legal estate, maintain trespass against the mortgagor for cutting wood and timber standing on the premises. It is regarded as an injury to the freehold rather than to the possession. The effect of the mortgage is to vest the legal estate at once in the mortgagee, and the right of possession also immediately passes, unless the mortgagor by stipulation retains the right of possession until condition broken; and in this case, after condition broken, the right of possession immediately accrues to the mortgagee.¹ As an incident to the right of possession follows the right to sue in trespass for any injury to the freehold by strip and waste.² The possession of the mortgagor is not adverse to the possession of the mortgagee. A second mortgagee may maintain the action, upon a discharge of the first mortgage subsequently to the commission of the waste,³ or upon a waiver by the first mortgagee of his right of action.

It is said that trespass against the mortgagor for waste will lie for acts done while he was in possession, if the action be brought by the mortgagee after he has entered, — the law by a kind of *jus post liminii* supposing the freehold all along to have continued in him.⁴ After a mortgagee has entered for condition broken, he may maintain an action for waste done by a tenant for life in cutting trees before the entry, — and before any breach of condition; and it is no defence for the tenant that the waste, which consisted in cutting down trees on the land, was committed by a stranger, who was a mere trespasser.⁵

If the mortgagor, after condition broken, cut timber and leave it upon the mortgaged premises until the mortgagee takes possession, having no title to it as against the mortgagee, he is liable

¹ Page v. Robinson, 10 Cush. (Mass.) 99; Hapgood v. Blood, 11 Gray (Mass.), 400. In Waterman v. Matteson, 4 R. I. 539-543, the court seemed to think that trespass, which is an action appropriate only to an injury to the *possession*, could not be maintained by a mortgagee who has never had possession.

² Sanders v. Reed, 12 N. H. 58; Smith v. Moore, 11 N. H. 55; Pettengill v. Evans, 5 N. H. 54; Stowell v. Pike, 2 Me. 387; Smith v. Goodwin, 2 Me. 173; Harris v. Haynes, 34 Vt. 220; Mitchell v. Bogan, 11 Rich. (S. C.) 686.

³ Sanders v. Reed, *supra*.

⁴ Pettengill v. Evans, 5 N. H. 54.

⁵ Fay v. Brewer, 3 Pick. (Mass.) 203.

in trespass *quare clausum*, or in trover, or in an action on the case in the nature of waste, for removing it.¹ If, under such circumstances, the wood be attached as the property of the mortgagor and sold upon execution, the purchaser acquires no more title than the mortgagor had, and he cannot be compelled to pay the price bid for it.²

But before the condition of a mortgage is forfeited, the mortgagee is not entitled to an action of waste against the mortgagor. Waste is an injury to the inheritance, and an action for waste is given to him who has the inheritance in expectancy. The interest of the mortgagee, especially before the mortgage is forfeited, is contingent, and may be defeated by payment; and is not such an interest as will sustain the action.³

688. When replevin for the timber cut may be maintained. In Rhode Island it is held that the mortgagee may maintain replevin, after condition broken, against the mortgagor in possession, for wood and timber cut upon the mortgaged premises, when this results in wrongful waste and in substantial diminution of the mortgaged security. The court considered that the wrongful act of the mortgagor, in severing the timber and wood from the freehold, could not deprive the mortgagee of his right to it under the mortgage as security for the debt. The wrong-doer should derive no advantage from his wrongful act.⁴

Under a different view of the nature of a mortgage, a mortgagee cannot maintain replevin for a house built by the mortgagor after the making of the mortgage, and sold and removed by a purchaser of the premises before foreclosure. "If such an action can be maintained," say the court, "a mortgagee may recover from the purchasers all the timber, stone, or other property severed from the realty and sold by the mortgagor, though its value may exceed the mortgage debt an hundred fold, and however ample the security may remain; although it is quite clear on principle and authority that the purchaser of property so removed by the mortgagor cannot be liable in an action for the waste beyond the actual loss the mortgagee thereby sustains."⁵

¹ Hagar v. Brainerd, 44 Vt. 294; Morey v. McGuire, 4 Vt. 327; Lull v. Matthews, 19 Vt. 322; Langdon v. Paul, 22 Vt. 205.

² Lull v. Matthews, 19 Vt. 322.

³ Peterson v. Clark, 15 Johns. (N. Y.) 205.

⁴ Waterman v. Matteson, 4 R. I. 539.

⁵ Clark v. Reyburn, 1 Kans. 281.

689. Liability of a purchaser of timber from the mortgagor. The mortgagee, being entitled to the timber cut upon the mortgaged premises, may claim it in the hands of a purchaser from the mortgagor.¹ He may retake the property itself from such purchaser, or he may recover the value of it from him. After he has notified the purchaser of his right to the property, and forbidden his paying the price of such timber to the mortgagor, the latter cannot maintain an action for such price. The mortgagee may, however, either directly or indirectly, waive his right to the timber severed from the land, and when that is the case the purchaser cannot resist paying the price of it to the mortgagor, from whom the purchase was made. The fact that the mortgagee acts for the mortgagor as his agent in collecting payment for the timber is a waiver of his own right.²

In New York, and probably in other states where the same doctrine in relation to the nature of mortgages prevails, it is held that the title to the wood cut from mortgaged land vests in one who has purchased and cut it without knowledge of the lien; and although the security is impaired, and the mortgagee has after the cutting notified the purchaser not to pay the purchase money to the mortgagor, he cannot recover it in a suit against the purchaser after he has so paid it regardless of the request.³ It is only when the purchaser cuts the wood with knowledge of the lien, and with the intent to injure the holder of it, that he is liable to him for the injury done the security.⁴

690. Mortgagee has no right of action after payment. — If the mortgagee purchase the mortgaged premises at the foreclosure sale, for the full amount then due on the mortgage, he has no claim to logs previously cut upon the premises.⁵ When he has been paid his debt his right of action is gone, although the trespass upon the property was committed before the payment.⁶

691. Mortgagee must account for any sum recovered for waste. — Of course, whatever sum the mortgagee may recover

¹ Frothingham v. McKusick, 24 Me. 403; Stowell v. Pike, 2 Me. 387; Gore v. Jenness, 19 Me. 53; Waterman v. Matteson, 4 R. I. 539; Adams v. Corrison, 7 Minn. 456; Bussey v. Page, 14 Me. 132.

² Kimball v. Lewiston, &c. Co. 55 Me. 494.

³ Wilson v. Maltby, 59 N. Y. 126.

⁴ Van Pelt v. McGraw, 4 N. Y. 110.

⁵ Berthold v. Holman, 12 Minn. 335.

⁶ Kennerly v. Burgess, 38 Mo. 440.

from the person who has cut timber upon the mortgaged estate, or whatever he may receive from the sale of the timber itself, when he has taken possession of that, he must account for upon the mortgage debt.¹

692. If the mortgagor have license to cut timber, of course such cutting is not waste, and such license may be implied from the terms of the mortgage, as in the case of one given as security for a note payable in wood, in which it was provided that the mortgagor was "not to cut wood or timber upon the said estate, except for the payment of said note, to reduce the value below the amount secured with interest annually." Even after a breach of the condition of the mortgage, the mortgagor had the right to cut timber to any extent, provided he did not so strip the land as to leave it of less value than the amount then due upon the note.²

Where the mortgagee has waived his right to the timber cut by the mortgagor, or has directly assented to his cutting it, or his assent may be fairly inferred from the circumstances of the case, he cannot afterwards claim it or treat the mortgagor as a trespasser.³

693. Abuse of an agreement allowing the cutting of wood. Where there is an agreement that the mortgagor may cut wood and timber from the mortgaged premises, the court will not allow an abuse of the privilege, but will restrain the exercise of it to an extent calculated to render the premises an insufficient security.⁴ But there must be an allegation in the bill, and proof that the land would not be an adequate security for the payment without the timber.⁵

No authority to commit waste by cutting off wood and timber can be implied from the fact that the land was purchased by the mortgagor for improvement for villa sites, nor from the price paid for it.⁶

If a mortgagee permit the owner of the land to sell the wood

¹ Guthrie v. Kahle, 46 Pa. St. 331.

507, 511, and cases cited; Buckout v.

² Ingell v. Fay, 112 Mass. 451.

Swift, 27 Cal. 433; Hill v. Gwin, 51 Cal.

³ Smith v. Moore, 11 N. H. 55.

47.

⁴ Emmons v. Hinderer, 24 N. J. Eq. 39;

⁶ Coggill v. Millburn Land Co. 25 N.

Ensign v. Colburn, 11 Paige (N. Y.), 503. J. Eq. 87.

⁵ Van Wyck v. Alliger, 6 Barb. (N. Y.)

under an agreement that the purchase price shall be paid to him, and the purchaser, without knowledge of the lien, goes on to cut the wood, he is then under no legal duty to defer, at the mortgagee's request, paying the price of the wood to the owner, and no legal proceedings having been taken to prevent it, payment to him is a valid discharge of the debt.¹

694. Mortgagor's right to wood for his own fires. — The mortgagor in possession of a farm, after condition broken, may cut wood for his own fires, for repairing fences, and for other purposes, according to the well known and existing usages of ordinary husbandry.²

“The well known and existing usages as to the mode of carrying on a farm to which a wood lot is attached, both as to the cutting of suitable wood for fires, and of timber for repairing fences, are not to be overlooked, and they may furnish justification for such acts.”³

And if he cut wood in good faith for his own use as fire-wood, before condition broken, as he may rightfully do, the title to it is not changed by the subsequent foreclosure of the mortgage while the wood still remains upon the ground, and the mortgagor may remove it without being held in trover for so doing.⁴

695. Mortgagee's right of action against mortgagor for injury to the property. — The mortgagor, or the owner of the equity, has no more right than a stranger to impair the security of the mortgagee by removal of buildings or fixtures, thereby causing substantial and permanent injury and depreciation to the security. The mortgagee's right of action in such case is based upon his interest in the property; and the damages are measured by the extent of the injury, and not by the extent of the insufficiency of the remaining security. Although the property in its damaged condition be of sufficient value to satisfy the mortgage debt, he is entitled to damages all the same. It is his right to hold the entire mortgaged estate for the full payment of his demand.⁵

¹ *Wilson v. Maltby*, 59 N. Y. 126.

³ Per Dewey, J., in *Hapgood v. Blood*,

² *Hapgood v. Blood*, 11 Gray (Mass.), *supra*.

400; *Page v. Robinson*, 10 Cush. (Mass.)

⁴ *Wright v. Lake*, 30 Vt. 206.

102; *Smith v. Moore*, 11 N. H. 62.

⁵ *Byrom v. Chapin*, 113 Mass. 308;

If a prior mortgagee settle in good faith and for a reasonable sum paid in satisfaction for the injury, the claim of a subsequent mortgagee is discharged, and his right of action for the injury barred ; but it is competent for him to show that the articles so removed were of greater value than the sum paid in satisfaction to the first mortgagee ; and also to show that the damage caused the premises was greater than that sum.¹

When fixtures are severed from the mortgaged property by the mortgagee without the consent of the mortgagor, in a state where the rule is that the title and right of possession remain in the mortgagor until foreclosure, the mortgagor may recover damages for the trespass committed by the persons who removed the fixtures. The fact that the mortgage was afterwards foreclosed and the property bought by the mortgagee, and conveyed to him by the sheriff, does not affect the case ; because the fixtures having been removed, they are freed from the operation of the mortgage, and the foreclosure does not affect them. The title to the fixtures was in the mortgagor at the time they were severed from the freehold, and he is entitled to recover their value.²

A mortgagee may have an action for injury done to the mortgaged property by a mob. If he has foreclosed his mortgage after the damage was done, and has himself become the purchaser at the sale, in order to recover he must prove not only the injury to the property, but his own loss of a part of the mortgage debt in consequence.³

696. Remedy for a fraudulent or wilful injury to the security. — When the mortgagee has not such possession of the mortgaged premises as will enable him to maintain trespass for a wrongful or fraudulent injury to the premises whereby his security is impaired, he may have an action on the case against the mortgagor or other person who has committed the wrongful act.⁴ Thus a purchaser from the mortgagor, who, with knowledge of the mortgage and of the mortgagor's insolvency, takes away the fences and cuts down and carries away valuable timber, is liable

Gooding v. Shea, 103 Mass. 360 ; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333.

¹ *Byron v. Chapin*, 113 Mass. 308.

² *Hill v. Gwin*, 51 Cal. 47. The fixtures removed were certain stamps, part

of a stamp battery, and a mortar block belonging to a mill.

³ *Levy v. New York*, 3 Robt. (N. Y.)

194.

⁴ *Yates v. Joyce*, 11 Johns. (N. Y.) 136 ; *Lane v. Hitchcock*, 14 Ib. 213.

to such action; and in order to sustain the action, it is not necessary to show that the defendant's motive was to injure the plaintiff's security. He is presumed to intend the necessary consequences of his acts.¹ To sustain such action it must be alleged and proved that the mortgagee's security is actually impaired; that the security after the injury is insufficient, and that the mortgagor is insolvent. Consequently, where it appeared in an action against a purchaser from the mortgagor for removing buildings from the mortgaged premises after they had been advertised for sale under a power, that the property was worth more than the mortgage debt, the action was not sustained.²

It has been held that a mortgagee has not such a direct title to the property as to enable him to maintain an action against a third person for an injury done the premises through his negligence, though he might do so if the injury were done with the express intent to damage the premises, the mortgagor being unable to pay the debt; thus an action cannot be maintained by him for negligently removing earth from a hill adjoining the mortgaged premises in such a manner as to allow the earth to slide down upon the premises and injure them, although it might be maintained if the act had been done fraudulently, with the intent to injure the mortgagee.³

697. Emblements.—The mortgagor, until foreclosure or possession taken by the mortgagee, is entitled to emblements, and when they are severed, has an absolute right to them without any liability to account for them. They are covered by the mortgage until severance, but belong to the mortgagor afterwards.⁴ A mortgagee not in possession cannot therefore maintain trespass *quare clausum* against one who cuts and removes the grass.⁵

Trees and shrubs planted in a nursery for the purpose of cultivation and growth, until they are fit to be sold and transplanted, pass by a mortgage of the land, so that the mortgagor cannot remove them as personal chattels.⁶ But if the mortgagee had

¹ Van Pelt v. McGraw, 4 N. Y. 110.

² Lane v. Hitchcock, 14 Johns. (N. Y.) 213.

³ Gardner v. Heartt, 3 Den. (N. Y.) 232.

⁴ Woodward v. Pickett, 8 Gray (Mass.), 617; Colman v. Duke of St. Albans, 3 Ves. Jun. 25; Toby v. Reed, 9 Conn. 216;

Gillett v. Balcom, 6 Barb. (N. Y.) 370;

Cooper v. Cole, 38 Vt. 185; Brown v. Thurston, 56 Me. 126.

⁵ Hewes v. Bickford, 49 Me. 71; Woodward v. Pickett, *supra*; Page v. Robinson, 10 Cush. (Mass.) 99.

⁶ Maples v. Millon, 31 Conn. 598.

notice that the trees belonged to a firm of which the mortgagor was a member, though planted on his land with his assent, the firm has the right to remove them.¹

A mortgagor compelled to surrender the estate is not, like a tenant at will, entitled to emblements. The mortgagee may evict him without notice, and retain the emblements.² A lessee holding under the mortgagor by a lease granted subsequently to the mortgage, and without the mortgagee's concurrence, has no greater rights than the mortgagor; and when evicted by the paramount title of the mortgagee, as he may be without notice, he cannot retain the emblements.³ A purchaser at a foreclosure sale is entitled to the crops growing at the time of the sale, and may maintain trespass against the mortgagor or his lessee for taking and carrying them away.⁴ If the mortgagor become the purchaser at such sale he may maintain the action.⁵ Moreover, the purchaser at the foreclosure sale may, by injunction, restrain the mortgagor from taking the crops, and may restrain his creditor from proceeding under execution to levy upon them.⁶

After a foreclosure sale the mortgagee is not entitled to the crops growing at the time, as against the purchaser.⁷

698. But he may waive this right. — A mortgagor who was in default sowed a field on the mortgaged premises with rye. He died, and his administrator sold the crop. Before it was taken off, the mortgage was foreclosed under a power of sale, and at the sale the auctioneer announced that the rye having been sold was reserved. The purchaser at the mortgage sale claimed the crop; but he was adjudged not entitled to it, though he would have been had it not been expressly excepted.⁸

¹ *King v. Wilcomb*, 7 Barb. (N. Y.) 263.

² *Downard v. Groff*, 40 Iowa, 597; *Gilman v. Wills*, 66 Me. 273.

³ *Jones v. Thomas*, 8 Blackf. (Ind.) 428.

⁴ *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Downard v. Groff*, 40 Iowa, 597.

⁵ *Lane v. King*, 8 Wend. (N. Y.) 584.

⁶ *Crews v. Pendleton*, 1 Leigh (Va.), 297.

⁷ *Aldrich v. Reynolds*, 1 Barb. (N. Y.) Ch. 613.

⁸ *Sherman v. Willett*, 42 N. Y. 146. Chief Justice Earle said: "While a mort-

gagee is not bound to sell the mortgaged premises in parcels unless they are in the mortgage described in parcels, yet I have no doubt he may do so where the premises are so situated that he can sell in parcels; and in such a case, when he has sold land enough to satisfy his mortgage, he need sell no more; and in such a case, if any one can complain of a sale by parcels, and seek to avoid the foreclosure, it certainly cannot be a purchaser, but must be some one at the time interested in the equity of redemption. When it is admitted that a

mortgagee can release a portion of the premises and sell the remainder, although they are described as a whole in the mortgage, I do not see why he may not sell the same portion before releasing any. In this case, the mortgage was a lien upon the whole premises, including the rye, and at the time of sale, the mortgagee announced that he would not sell the rye, but would sell the balance. The purchaser knew this, and bid with this understanding. The rye was not sold. The purchaser did not buy it. How can he claim it? If the sale was void because not regularly made, and because the entire premises were not sold, then certainly the defendant has no standing upon which he can base any claim to the rye."

CHAPTER XVI.

A MORTGAGEE'S RIGHTS AND LIABILITIES.

1. *The Nature of his Estate or Interest.*

699. The mortgagee is not in a general sense the owner of the mortgaged estate, although, as already noticed under the common law doctrine, he holds the legal title to the estate.¹ Before foreclosure he can be regarded as the owner only in a very limited sense. A mortgage of certain lands, "with all the other lands I own in the town of Norfolk," was held not to pass the title to land which the grantor held by a deed absolute in its terms, which was in fact a mortgage, though the defeasance by a separate instrument had not been recorded.² For some purposes, however, he may be regarded as an owner after he has taken possession;³ but before he has taken possession it seems that there is no sense in which he could be so regarded, unless it be with reference to a proceeding to enforce his rights as mortgagee.⁴

700. A mortgage before foreclosure is completed is personal assets, and upon the death of the mortgagee vests in his executor or administrator. The mortgage can be transferred or foreclosed only by the executor or administrator. A quitclaim deed by the heir at law passes no title whatever in the premises,⁵ although such a deed by the executor or administrator would transfer the mortgage interest by way of assignment;⁶ and even if the heir at law be at the same time administrator his deed will not operate as an assignment of the mortgage, if he does not con-

¹ §§ 11-59.

² *Mills v. Shepard*, 30 Conn. 98. In this case there was no proof that the mortgagee had examined the records and had taken the mortgage relying upon the security of the land in question. What the

effect of such evidence would have been is left in doubt.

³ *Lowell v. Shaw*, 15 Me. 242.

⁴ *Great Falls Co. v. Worster*, 15 N. H. 412; *Norwich v. Hubbard*, 22 Conn. 587.

⁵ *Connor v. Whitmore*, 52 Me. 185.

⁶ *Collamer v. Langdon*, 29 Vt. 32.

vey in the capacity of administrator.¹ The mortgage title vests in the personal representative, who may without any order of court assign or discharge it, or take possession of the property, or proceed to foreclose it by suit.² When foreclosure is had by entry and possession, or by strict foreclosure, the title to the property upon the completion of the foreclosure may ultimately vest in the heir at law; but it vests in him as a distributee of the personal estate, and is first subject to the payment of the debts of the deceased. The fact that there are no outstanding debts does not show that the title of the administrator is terminated; but a decree of distribution is necessary for this, and to determine in whom the property shall vest after the trust in him is satisfied.³ The heirs of a mortgagee have no right as such to enter for condition broken, or to take any action to enforce payment of the mortgage. The debt belongs to the executor or administrator, and the mortgage, which is security for the debt, equally belongs to him.⁴ If the heir cuts and carries away wood and timber from the mortgaged premises, he is liable in trespass to the administrator of the mortgagee, who is in possession by entry or judgment for foreclosure.⁵

701. The interest of a mortgagee cannot be levied upon or attached for his debts before foreclosure. Some of the earlier cases only decide that the interest of the mortgagee before entry is not attachable; but as all the inconveniences that would attend an attachment before entry continue until foreclosure is complete, the law seems to have become settled that no attachment of the mortgagee's interest can be made till foreclosure.⁶ While the right of redemption remains, the mortgagor might be much embarrassed by the levy of executions. Until this happens, the mortgaged

¹ *Douglass v. Darin*, 51 Me. 121.

² *Collamore v. Langdon*, *supra*; *Webster v. Calden*, 56 Me. 204.

³ *Taft v. Stevens*, 3 Gray (Mass.), 504.

⁴ *Smith v. Dyer*, 16 Mass. 18; and it is so provided by statute in this state. Gen. Stat. c. 96, §§ 9, 10.

⁵ *Stevens v. Taft*, 11 Cush. (Mass.) 147.

⁶ *Marsh v. Austin*, 1 Allen (Mass.), 235; *Portland Bank v. Hall*, 13 Mass. 207; *Blanchard v. Colburn*, 16 Mass. 345; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Jackson*

v. Willard, 4 Johns. (N. Y.) 41; *Runyan v. Mersereau*, 11 Ib. 534; *Jackson v. DuBois*, 4 Ib. 216; *Hitchcock v. Harrington*, 6 Ib. 290; *Collins v. Torrey*, 7 Ib. 278; *Huntington v. Smith*, 4 Conn. 235; *Fish v. Fish*, 1 Conn. 559; *Cooch v. Gerry*, 3 Har. (Del.) 280; *Brown v. Bates*, 55 Me. 520; *Johnson v. Hart*, 3 Johns. Cas. (N. Y.) 329. For an argument that the mortgagee's estate is subject to attachment, see *Notes of Mortgages*, by Judge Trowbridge, 8 Mass. Supplement, pp. 554, 565.

premises continue to be real estate in the hands of the mortgagor, and liable to be sold on execution against him.

702. When the mortgagee is entitled to possession.—The legal estate being vested in the mortgagee, in the absence of any agreement to the contrary, he may enter upon the estate under his deed, even before condition broken, and may maintain an action against the mortgagor as a trespasser, or in a writ of entry recover against him as a disseisor, if he refuse to yield possession. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor or any one claiming under him, but he has them for this purpose only.¹

It has already been noticed that in several states the mortgagee's right before foreclosure to maintain ejectment against the mortgagor, or to recover possession in any way, has been taken away by statute. But this right of possession being implied by law in all mortgages executed prior to the passage of such a statute, it is therefore inoperative as to mortgages of prior execution.²

But even under such statutes it is generally held that a mortgagee, who has gone into peaceable possession of the premises after a default, cannot be ejected by the mortgagor while the mortgage remains unsatisfied.³ Any one who has entered into possession under the direction of the mortgagee becomes his tenant, and has the same rights as the mortgagee to retain possession as against the mortgagor. The assignee of a mortgage has all the rights of the mortgagee as to possession, and may defend his possession by showing his mortgage without a foreclosure.⁴

¹ *Erskine v. Townsend*, 2 Mass. 493; *Goodwin v. Richardson*, 11 Mass. 473; *Newall v. Wright*, 3 Mass. 155; *Green v. Kemp*, 13 Mass. 518; *Bradley v. Fuller*, 23 Pick. (Mass.) 9; *Smith v. Johns*, 3 Gray (Mass.), 517; *Fay v. Brewer*, 3 Pick. (Mass.) 203; *Flagg v. Flagg*, 11 Ib. 475; *Blanchard v. Brooks*, 12 Ib. 47, 57; *Fay v. Cheney*, 14 Ib. 399; *Shute v. Grimes*, 7 Blackf. (Ind.) 1; *Brown v. Stewart*, 1 Md. Ch. 87; *Walcop v. McKinney*, 10 Mo. 229; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Jackson v. Hull*, 10 Ib. 481; *Furbush v. Goodwin*, 29 N. H. 321; *Allen v. Parker*, 27 Me. 531; *How-*

ard v. Houghton, 64 Me. 445; *Treat v. Pierce*, 53 Me. 77; *Den v. Stockton*, 12 N. J. L. (7 Halst.) 322; *Ely v. M'Guire*, 2 Ohio, 223; *Clark v. Reyburn*, 1 Kans. 281.

² *Blackwood v. Van Vleet*, 11 Mich. 252. Applicable only to suits commenced afterwards. *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165; *Grimes v. Doe*, Ib. 371; *Morgan v. Woodward*, 1 Ind. 321.

³ *Hennesy v. Farrell*, 20 Wis. 42.

⁴ *Sahler v. Signer*, 44 Barb. (N. Y.) 606; *Minkler v. Minkler*, 10 Johns. (N. Y.) 480; *Merrit v. Bowen*, 7 Cow. (N. Y.) 13; *Phye v. Riley*, 15 Wend. (N. Y.) 248.

703. A mortgagee cannot be disseised by the mortgagor.¹—His possession is not adverse; it is presumed to be in subordination to the title of the mortgagee. He can do no act prejudicial to the mortgagee's title. He cannot bind the mortgagee by any contract or lease respecting the premises. All his acts are subject to the mortgagee's rights; and his possession is not adverse, except the mortgagee elect so to regard it for the sake of his remedy to obtain possession. The mortgagee may treat any person found in possession of the mortgaged premises without a title good against him as a disseisor.²

But a mortgagee as well as a mortgagor may be disseised by a stranger; provided there be an actual ouster and exclusive occupation, and not a qualified and occasional use of the land. While such disseisin continues the mortgagee's deed will not pass his interest in the land. The disseisin of the mortgagor is also a disseisin of the mortgagee. This is so even before the mortgagee has made actual entry, and though he has no notice whatever of the disseisin. An exclusive and adverse occupation of the estate by a stranger under a claim of title operates to disseise both the mortgagor and mortgagee,³ and while this continues the mortgagee cannot make a valid assignment of his mortgage.⁴ If, however, the equity of redemption be sold by the sheriff on execution while the mortgagor is disseised, the sale is not void, but the purchaser by the sheriff's deed acquires a seisin in law, which gives him a right of entry, and after actual entry he may maintain a writ of entry.

But exclusive possession by the mortgagor, with a claim of exclusive ownership, does not in itself amount to a disseisin of the mortgagee so as to invalidate a power of sale contained in the mortgage.

Disseisin, like seisin, once proved is presumed to continue until the contrary is shown. Possession under a disseisor is presumed

¹ *Hunt v. Hunt*, 14 Pick. (Mass.) 374; *Shepard v. Pratt*, 15 Ib. 32; *Colton v. Smith*, 11 Ib. 311; *Herbert v. Hanrick*, 16 Ala. 581; *Beach v. Royce*, 1 Root (Conn.), 244; *Judd v. Woodruff*, 2 Ib. 298; *Noyes v. Sturdivant*, 18 Me. 104; *Sweetser v. Lowell*, 33 Me. 446; *Conner v. Whitmore*, 52 Me. 185; *Kruse v. Scripps*, 11 Ill. 98.

² *Wheeler v. Bates*, 21 N. H. 460; *Poignand v. Smith*, 8 Pick. (Mass.) 272.

³ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Poignand v. Smith*, 8 Pick. (Mass.) 272; *Sheridan v. Welch*, 8 Allen (Mass.), 166.

⁴ *Poignand v. Smith*, *supra*.

to continue under his heirs after his death, in absence of evidence to the contrary.¹

704. A mortgage to two or more persons, to secure debts due to them severally, creates a tenancy in common, and not a joint tenancy.² The interest of each is not necessarily a moiety, but in proportion to their respective claims.³ Each may enforce his claim under the mortgage in a form adapted to the case.⁴ Upon the death of one the survivor cannot maintain an action on the mortgage to enforce the payment of the debt secured by it to the deceased mortgagee.⁵ To a bill in equity affecting interests under such a mortgage, it is not sufficient to make the surviving mortgagee alone a party; the representatives of the deceased mortgagee must be joined.⁶ But if a mortgage be made to partners to secure a joint debt, inasmuch as the debt itself would in case of the decease of one partner vest in the survivor for the purpose of collection, it is held that the estate is a joint tenancy, so that the mortgage security may, by the principle of survivorship, accompany the debt.⁷ After foreclosure, however, the new absolute estate then acquired is considered as a tenancy in common, such as would ordinarily be created by a conveyance to two or more persons.⁸

705. When mortgagees may have partition. — Before foreclosure, mortgagees holding under one mortgage, or by simultaneous mortgages, as joint tenants or tenants in common, have no such interest as can be the subject of partition.⁹ Until foreclosure the estate is to most purposes in the mortgagor, and is only a lien or charge, subject to which it may be conveyed, attached, and dealt with in other respects, as the estate of the mortgagor, who may wholly defeat the estate of the mortgagee by redemption. An entry to foreclose does not change this defeasible and

¹ *Currier v. Gale*, 9 Allen (Mass.), 522.

² *Brown v. Bates*, 55 Me. 520.

³ *Donnels v. Edwards*, 2 Pick. (Mass.) 617; and see *Beresford v. Ward*, 1 Disney (Ohio), 169.

⁴ *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

⁵ *Burnett v. Pratt*, *supra*; *Kinsley v. Abbott*, 19 Me. 430.

⁶ *Smith v. Trenton Delaware Falls Co.* 4 N. J. Eq. (3 Green) 505.

⁷ *Appleton v. Boyd*, 7 Mass. 131. In *Randall v. Phillips*, 3 Mason, 378, Mr. Justice Story held that such a mortgage is a tenancy in common. But at the same time he maintained, that on the death of one partner his heirs would take his interest charged with an implied trust for the survivor as security for the debt.

⁸ *Goodwin v. Richardson*, 11 Mass. 469.

⁹ *Ewer v. Hobbs*, 5 Met. (Mass.) 1.

redeemable interest of the mortgagee. He has no absolute and certain estate till foreclosure is complete.

A mortgagee of an undivided half of a lot of land upon a completed foreclosure may have partition of the land, against the owner of the other half.¹ But until foreclosure is complete the mortgagee does not become a tenant in common with the owner of the other undivided part; he is merely a mortgagee having a lien or charge, from which the mortgagor may redeem the estate, and subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor. He cannot maintain a petition for partition, neither can such a petition be maintained against him by the owner of the other part, or by a judgment creditor of such owner.²

706. When the mortgagee is bound by a partition of the mortgaged premises between the mortgagors. — One holding a mortgage of the interest of one tenant in common of land is not bound by a partition made by the owners, unless he be made a party to the suit, or voluntarily ratifies the partition made.³ The effect of a partition in which the mortgagee has joined as to his interest, and that of his mortgagor, is to substitute for an undivided interest in the whole land, the whole of the portion set off to the mortgagor in severalty. No part of his mortgagor's estate is thereby discharged from the mortgage.⁴

A tenant in common who has mortgaged his undivided share in the land may, so long as he remains in possession, maintain a petition for partition against the owner of the other shares in the land;⁵ but if his mortgagee be the owner of the other shares he cannot without his consent have partition; for it is an adverse proceeding affecting either the title, or the possession, or both, and the mortgagee has both the legal title and, after default at least, the right of possession.⁶

If one tenant in common take an assignment of a mortgage

¹ Phelps v. Townsley, 10 Allen (Mass.), 554.

² Norcross v. Norcross, 105 Mass. 265.

³ Colton v. Smith, 11 Pick. (Mass.) 311.

⁴ Torrey v. Cook, 116 Mass. 163; Bradley v. Fuller, 23 Pick. (Mass.) 1, per Wilde J. "Tenants in common have sep-

arate freeholds or estates; they have no unity of interest, but unity of possession only. This unity of possession is destroyed by partition, but the estate remains the same." See, also, Jackson v. Pierce, 10 Johns. (N. Y.) 414.

⁵ Upham v. Bradley, 17 Me. 423.

⁶ Fuller v. Bradley, 23 Pick. (Mass.) 1, 8.

upon it, his co-tenant cannot maintain a petition for partition against him, but his only remedy is by redemption of the whole mortgage, or contribution of his share of the incumbrance.¹

2. *His Rights against the Mortgagor.*

707. A mortgagee is entitled to the whole security. — He has a right to the whole mortgaged premises as security for his debt, and cannot be compelled to take a portion of the premises either as security or payment, or to submit to the uncertain result of a sale by order of court. A creditor of the mortgagor, by levying an execution on the equity of redemption, and having an undivided part set off to him, acquires no right to have the premises sold and the proceeds divided between himself and the mortgagee, though the premises are worth more than enough to pay the debts to both.²

Although the land subject to a mortgage be subsequently laid out in lots and streets, and the streets opened and dedicated to the public by the owner of the land, the mortgagee's lien upon the land covered by the streets is not affected. But if sales of lots bounding upon the streets be made, and the mortgagee releases those lots from the operation of his mortgage by deeds referring to a map of the land as laid out, and reciting that they are the lots previously conveyed by the owner, the release discharges not only the lien upon the lots, but upon half of the street in front of them.³

708. An award of damages. — When the mortgaged property has been turned into money, or a claim for money, in any way, as for instance by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim.⁴ Thus if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them, as an equivalent for the land taken for the street.⁵

¹ Blodgett v. Hildreth, 8 Allen (Mass.), 186.

² Spencer v. Waterman, 36 Conn. 342.

³ Hagne v. Inhabitants of West Hoboken, 23 N. J. Eq. 354.

⁴ Brown v. Stewart, 1 Md. Ch. 87.

⁵ Astor v. Hoyt, 5 Wend. (N. Y.) 603.

Damages awarded to a mortgagor for land taken for a right of way, or other public improvement, become a substitute for the premises taken, and the mortgage is a specific lien upon the fund;¹ as also do damages awarded by the state, for an injury done to the property by the abandonment of a canal, equitably belong to the holder of the mortgage.² "The sum awarded arises from or grows out of the land, by reason of the injury which has diminished its value. In equity it is the land itself."³

The mortgage lien attaches to the surplus arising from the sale of the premises under a prior incumbrance.⁴

709. A mortgagee is an essential party to any proceeding affecting his rights to the mortgaged premises: as for instance to a bill to set aside a previous sale of the property under proceedings in insolvency; ⁵ to a bill to compel performance of a contract by the owner to convey the estate; ⁶ to an application to set apart a portion of the mortgaged premises as a homestead; ⁷ or to a suit to set aside a purchase of real estate by an administrator who had given a mortgage while in possession, and claims title under his purchase.⁸ But a mortgagee who has not entered is not a necessary party to a proceeding which relates altogether to an injury done to the possession; as for instance to a complaint for flowage under the mill act; for the damages in such case belong exclusively to the mortgagor in possession, being paid annually; in the same manner that any other annual products or damages for injury to them, or to the possession of the land, belong to the mortgagor alone.⁹

710. A mortgagee is to the extent of his claim a purchaser of the land, and is entitled to the same protection from all secret equities and trusts of which he had no notice as any other *bonâ fide* purchaser.¹⁰ He is not affected by his mortgagor's fraud in acquiring his title.¹¹

¹ Astor v. Miller, 2 Paige (N. Y.), 68.

² Bank of Auburn v. Roberts, 44 N. Y. 192; S. C. 45 Barb. 407.

³ Per Leonard, C., in Bank of Auburn v. Roberts, *supra*.

⁴ Bartlett v. Gale, 4 Paige (N. Y.), 503.

⁵ Coiron v. Millaudon, 19 How. 113.

⁶ Hoxie v. Carr, 1 Sumn. 173.

⁷ Lies v. De Diablar, 12 Cal. 327.

⁸ Woodruff v. Cook, 2 Edw. (N. Y.)

259.

⁹ Paine v. Woods, 108 Mass. 160.

¹⁰ Pierce v. Faunce, 47 Me. 507; Martin v. Jackson, 27 Pa. St. 504.

¹¹ Stockton v. Craddick, 4 La. Ann. 285.

When the mortgage was executed by the mortgagor for the purpose of defrauding his creditors, although the mortgagee had no notice of such fraudulent intent he cannot be considered a *bonâ fide* purchaser beyond the amount paid by him at the time.¹ But a mortgagee who has knowledge of a previous conveyance of the mortgaged property, although it be fraudulent as to the mortgagor's creditors, cannot call in question its validity.²

711. That a mortgagee may purchase the mortgagor's equity of redemption, though doubted in some early cases, is as a general proposition true.³ The relation between them is not so far analogous to that between a trustee and *cestui que trust* as to preclude the mortgagee's purchasing. The real reason why a person standing in the relation of trustee cannot purchase from his *cestui que trust* is, that he cannot purchase that which he has to sell. He has a duty to perform as a trustee, in selling for the best advantage of the beneficiary; and this is inconsistent with his personal interest to obtain the property on terms advantageous to himself. But there is no trust relation between the mortgagor and the mortgagee. The mortgagee is under no obligation to protect the equity of redemption. In exercising a sale under the power which usually accompanies a mortgage, this trust relation will arise so as to prevent his purchasing unless he is authorized to by statute, or by the contract itself, to become a pur-

¹ Tripp v. Vineent, 8 Paige (N. Y.), 176; Hall v. Arnold, 15 Barb. (N. Y.) 599.

² Fox v. Willis, 1 Mich. 321.

³ See chapter xxii. on "REDEMPTION." Knight v. Majoribanks, 2 Mac. & G. 10; Ten Eyck v. Craig, 62 N. Y. 406; 2 Hun, 452; 5 Thomp. & C. 65; Remsen v. Hay, 2 Edw. (N. Y.) 535; Hicks v. Hicks, 5 Gill & J. (Md.) 75; Hinkley v. Wheelwright, 29 Md. 341; Green v. Butler, 26 Cal. 595; Shelton v. Hampton, 6 Ired. (N. C.) L. 216.

In *Whicheote v. Lawrence*, 3 Ves. 740, Lord Chancellor Loughborough states the rule with force and accuracy: "The rule is laid down not very correctly in most of the cases, where you find it. It is stated as a proposition, that a trustee cannot buy of the *cestui que trust*. Certainly that

naked proposition is not correctly true; but an emanation from that, which prevails in most cases, in all laws and countries, where trusts are admitted, led to great discussion in *M'Enzie's case*, to prove that the sale, where the trustee to sell is the purchaser, is *ipso jure* null; that there is no sale, no contracting party. That is not the real sense of the proposition; but it is this, — which is very plain in point of equity, and a principle of clear reasoning: that he who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit."

chaser. There he has a trust to fulfil in selling for the mortgagor. But until this trust arises he may deal with the mortgagor himself in respect to the mortgaged estate; subject only to the qualification that the courts look upon their transactions with jealousy, and will set aside a purchase made by the mortgagee, when by the influence of his position he has purchased the equity of redemption for a less price than others would have given.¹

The general rule therefore is, that the mortgagee may acquire the equity of redemption, either directly from the owner, or at a sale by his assignee in bankruptcy, or by his creditor upon execution.² He may acquire any title adverse to the mortgagor, whatever it may be, and set it up against his claim to redeem.³

712. The fact that the mortgagee is in possession does not change the rule. By taking possession he does not become a trustee, except in a limited sense. He may, perhaps, be called a trustee in respect to his liability to account for the rents and profits.⁴ "No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it; and after that is fully satisfied its primary character is not fiduciary."⁵ A purchase by the mortgagee in possession will be carefully scrutinized when fraud is charged; and to avoid the purchase in equity it is not necessary to show actual fraud, but constructive fraud is sufficient for that purpose, or even an unconscientious advantage taken of a mortgagor in needy circumstances, which ought not to be retained.⁶ A grossly inadequate price paid for the equity of redemption is ground for such relief.⁷

An agreement made between the mortgagor and mortgagee, after the making of the mortgage, that the mortgagee may purchase the equity of redemption at an appraisal, in the absence of any unfairness in its terms has been held valid and enforced.⁸

¹ *Webb v. Borke*, 2 Sch. & Lef. 661, 3 Cow. (N. Y.) 151; *Duval v. P. & M. Bank*, 10 Ala. 636.
per Lord Redesdale; *Ford v. Olden*, L. R. 3 Eq. 461.

² *Blythe v. Richards*, 10 S. & R. (Pa.) 261.

³ *Walthall v. Rives*, 34 Ala. 91; *Harrison v. Roberts*, 6 Fla. 711.

⁴ Per Chief Justice Shaw, in *King v. Ins. Co.* 7 Cush. (Mass.) 7; *Ten Eyck v. Craig*, 62 N. Y. 406, 422; *Clark v. Bush*,

⁵ *Sir Thomas Plumer*, in *Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 183.

⁶ *Russell v. Sonthard*, 12 How. 139; *Hyndman v. Hyndman*, 19 Vt. 9; *Perkins v. Drye*, 3 Dana (Ky.), 170; *Chapman v. Mull*, 7 Ired. (N. C.) Eq. 292.

⁷ *McKinstry v. Conly*, 12 Ala. 678.

⁸ *Austin v. Bradley*, 2 Day (Conn.),

The mortgagee in possession may even purchase the equity of redemption at a sale upon an execution in his own favor issued upon a judgment for a debt other than the mortgage debt; and may hold the title adversely to the mortgagor if he does not redeem, as from a sale upon execution.¹

713. There is a limitation of this rule whenever the mortgagee has either expressly assumed any duty to protect the mortgaged estate in any particular, or such a duty impliedly arises from the relation of the parties. Thus, for instance, it is generally the duty of the mortgagee in possession and receiving an income from the estate to pay the taxes upon it; and therefore he is not allowed to suffer the estate to be sold for taxes, and upon purchasing it in, to set up this title as a bar to the mortgagor's redeeming. He is on the contrary regarded as holding this title in trust for the mortgagor's benefit. He may, however, under some circumstances, acquire a tax title, and hold it adversely to the owner of the equity of redemption;² but this is only when he is under no obligation himself to pay the taxes on which the sale was made.

714. When the payment of the taxes is duty on his part, he is like a trustee, and cannot affect the rights of the mortgagor by purchasing the property at a sale for such taxes.³ Such is his position when he has taken possession of the premises for the purpose of foreclosing his mortgage.⁴ He may pay the taxes, and add the amount to the debt secured by the mortgage, but he cannot acquire an adverse title by a purchase at a sale by the tax collector.⁵

466. In this case the mortgagor, after a breach of the condition, agreed in writing to make an absolute conveyance of the premises by warranty deed, on demand, at an appraisal, and that if the appraised value should be more than the sum due on the mortgage the balance should be paid to the mortgagor within one year from the date of the agreement. The appraisal was made, and the balance due the mortgagor was tendered within the time specified to his executors, he having died, and a demand made of a conveyance. The

court held that the agreement should be enforced.

¹ *Trimm v. Marsh*, 54 N. Y. 599; *Woodlee v. Burch*, 43 Mo. 231; *Walthall v. Rives*, 34 Ala. 92; *Harrison v. Roberts*, 6 Fla. 711.

² *Williams v. Townsend*, 31 N. Y. 411.

³ *Ten Eyck v. Craig*, 62 N. Y. 406, 422, per *Andrews, J.*; *Chickering v. Failes*, 26 Ill. 507; *Moore v. Titman*, 44 Ill. 367.

⁴ *Brown v. Simons*, 44 N. H. 475.

⁵ *Brown v. Simons*, *supra*; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398.

A junior mortgagee cannot before foreclosure of his mortgage acquire a title to the premises paramount to a prior mortgage by taking a tax deed of the same. If he acquire such title after foreclosure of his mortgage and purchase of the premises, he could not set it up against the first mortgagee if the tax was levied after he took possession, because he would then stand in the place of a purchaser, who is bound to pay the taxes.¹ Whether he could gain any rights superior to those of the first mortgagee by purchasing a tax title, outstanding at the time of the foreclosure of his mortgage, or issued upon a sale for taxes assessed before that time, and which he was under no obligation to pay, has not, perhaps, been decided; but it would seem that he should not be allowed to set up such title so as to wholly defeat the rights of the prior mortgagee. Upon the ground that taxes are charged as much upon the mortgage interest as upon the equity of redemption, it has been declared that a subsequent mortgagee cannot, by purchasing the tax title, use it adversely to the first mortgage. Such title in his hands enures to the protection rather than the destruction of the title of the prior mortgage.²

If a mortgagee of a lease obtain a renewal of it, the mortgagor is entitled to the benefit of it, he paying the mortgagee for his charges. "The mortgagee but grafts upon his stock, and it shall be for the mortgagor's benefit."³ The rule is the same in case the lease expired before the renewal of it. So if a mortgagee, by an agreement with the mortgagor, purchase an outstanding prior incumbrance, the mortgagor is entitled to redeem from such outstanding title on payment of the sum paid by the mortgagee for it.

715. A mortgagee cannot be divested of possession until payment. — Even where a mortgagor cannot be divested of his possession without a foreclosure and sale, if he has with the assent of the mortgagor obtained possession, he may retain it until payment of the mortgage debt, and the mortgagor cannot, by an action of ejectment or otherwise, recover possession until the debt is paid.⁴ Chief Justice Comstock, in the Court of Appeals of New

¹ *Smith v. Lewis*, 20 Wis. 350.

² *Horton v. Ingersoll*, 13 Mich. 409.

³ Lord Chancellor Nottingham in *Rushworth's case*, Freem. 12; *Rakestraw v.*

Brewer, 2 P. Wms. 510; *Nesbett v. Tredennick*, Ball & B. 29; *Moore v. Titman*, 44 Ill. 367.

⁴ *Hubbell v. Moulson*, 53 N. Y. 225;

York,¹ speaking of the use of this action for the recovery of possession of the mortgaged premises, said: "When the legislature by express enactment denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law, which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor, between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer."

A mortgagee who has acquired possession before his mortgage became due, by virtue of some other title, is to be deemed at the maturity of his mortgage as holding as a mortgagee in possession upon a forfeiture; and therefore, although he has lost the title under which he originally entered, he may defend his possession under his mortgage.²

The mortgagee's right to enter in any lawful mode and hold possession of the mortgaged premises may be presumed from the mortgage itself, unless there be some agreement modifying the presumption. Although he cannot recover possession by ejectment, being in possession he may hold possession. Even when one is a trespasser in the first instance, and while holding in this way takes an assignment of a mortgage, it would seem after forfeiture, at least, that the mortgagor's consent to his holding possession would be inferred from the mortgage itself.³ At any rate one who has entered in this way may, after forfeiture, defend his

Pell v. Ulmar, 18 N. Y. 139; Watson v. Spence, 20 Wend. (N. Y.) 260; Fox v. Lipe, 24 Ib. 164; Phyfe v. Riley, 15 Ib. 248; Van Duyne v. Thayre, 14 Ib. 233; Fogal v. Pirro, 17 Abb. (N. Y.) Pr. 113; 10 Bosw. 100; Chase v. Peck, 21 N. Y. 586; Roberts v. Sutherlin, 4 Oregon, 219.

¹ See Kortright v. Cady, 21 N. Y. 343, 365.

² Winslow v. McCall, 32 Barb. (N. Y.) 241; Bolton v. Brewster, Ib. 389.

³ Madison Av. Church v. Oliver St. Church, 41 N. Y. Superior Ct. 369, per Sedgwick, J.

possession as assignee of the mortgage ;¹ but the mortgage before default would not, it would seem, enable him to defend his wrongful possession of the premises.²

It has been held, however, that possession obtained by a mortgagee, through collusion with the mortgagor's tenant, is not lawful.³

716. If the mortgagee lawfully obtains possession after forfeiture, the mortgagor cannot recover possession without satisfying the mortgage. He cannot maintain ejectment for the premises ; his remedy is by a bill to redeem.⁴

By the purchase of an overdue mortgage one already in lawful possession of the premises, as for instance when he has entered, with the owner's consent, under a contract to purchase them, may by virtue of such title hold them until the debt is paid.⁵ But if he has not acquired the mortgage title at the time of the bringing of suit against him to recover possession of the mortgaged premises, his subsequent purchase of the mortgage will not avail him as a defence.⁶

The beneficiary under a trust deed after condition broken entered upon the premises, and without any sale under the trust deed conveyed the estate. The maker of the deed of trust brought an action of ejectment against the purchaser, and it was held that although the conveyance did not pass to him the legal title, it operated as an assignment of the equity of the beneficiary ; and that being in possession, he could defend successfully against the grantor, unless he paid the debt secured.⁷ He is not a mere stranger setting up a title in another.⁸

717. In Michigan, however, the mortgagor may recover possession from the mortgagee at any time before his rights have in

¹ *Ib.*

² *Madison Av. Baptist Church v. Baptist Church in Oliver St.* 19 Abb. (N. Y.) Pr. 105.

³ *Russell v. Ely*, 2 Beach, 575 ; *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

⁴ *Den v. Wright*, 7 N. J. L. (2 Halst.) 175 ; *Hennessy v. Farrell*, 20 Wis. 42 ; *Gillet v. Eaton*, 6 Wis. 30 ; *Tallman v. Ely*,

6 Wis. 244 ; *Stark v. Brown*, 12 Wis. 572 ; *Pace v. Chadderdon*, 4 Minn. 499.

⁵ *Madison Av. Baptist Ch. v. Baptist Church, &c.* 2 Robert (N. Y.), 642 ; 3 *Ib.* 570 ; 19 Abb. Pr. 105 ; 1 Abb. Pr. N. S. 214.

⁶ *Hall v. Bell*, 6 Met. (Mass.) 431.

⁷ *Johnson v. Houston*, 47 Mo. 227.

⁸ *Woods v. Hilderbrand*, 46 Mo. 284.

some manner been foreclosed.¹ If he goes into possession without permission of the mortgagor he may be removed through a suit of ejectment.² Having a right of possession by statute, it is held that he may enforce the right. His right to possession must exclude the mortgagee's right to hold it. "It would be absurd," said Mr. Justice Campbell, "to hold there could be a right of possession which could not lawfully be enforced."³ When the mortgagee has entered by permission, it would seem that his possession could not be disturbed by the mortgagor without redemption; but in such case his authority would be regarded as resting upon the license, and not upon the mortgage.⁴

718. Writ of entry. — If the possession of a mortgagee after entry is interfered with by the mortgagor or those claiming under him, the mortgagee may maintain his title and his right to possession by a writ of entry, declaring on his own seisin, and may have an absolute judgment for possession as at common law, with damages for the rents and profits of which he was wrongfully deprived.⁵ Such judgment does not interfere with the mortgagor's right to redeem, and upon redemption to claim the rents and profits so recovered. Moreover, when the mortgagee has not been disturbed in his possession, but he has either before or after condition broken the right of possession, he may have judgment at common law against the mortgagor in a writ of entry, unless the defendant claims the conditional judgment where foreclosure may be had by this process.⁶

719. Ejectment. — After the maturity of the mortgage, a mortgagee, without foreclosure or sale, may maintain ejectment against the mortgagor, without giving him previous notice.⁷ A second mortgagee may maintain the action, although there be an outstanding first mortgage still unsatisfied. The first mortgagee

¹ *Humphrey v. Hurd*, 29 Mich. 44; *Shaw, C. J.* "The action is therefore against wrong-doers, and not against mortgagors."

Caruthers v. Humphrey, 12 Mich. 270.

² *Newton v. McKay*, 30 Mich. 380.

³ *Newton v. McKay*, *supra*.

⁴ *Newton v. McKay*, *supra*, per Campbell, J.

⁶ *Howard v. Houghton*, 64 Me. 445; *Treat v. Pierce*, 53 Me. 77.

⁵ *Stewart v. Davis*, 63 Me. 539; *Milner v. Stevens*, 1 Cush. (Mass.) 468, per

⁷ *Allen v. Ranson*, 44 Mo. 263; *Carroll v. Ballance*, 26 Ill. 9.

is regarded as holding the legal title only for the purpose of enforcing payment of the debt.¹

If the mortgagee bring ejectment for possession of the property, the defendant may prove by parol that the mortgage debt has been paid.

After the mortgage debt has been satisfied the mortgagee cannot maintain an action at law to recover possession, although it has not been formally satisfied.

In such suit, however, the mortgagor cannot introduce evidence to show that the mortgage is one of indemnity, and that the mortgagee has suffered no damage.² Even the admissions of the mortgagee that the mortgage is not a lien are not admissible, except in favor of a subsequent purchaser or incumbrancer, who has been misled by them.³ The mortgage alone, duly executed, acknowledged, and recorded, is admissible in evidence of the mortgagee's title to the land mortgaged, without first producing the notes which it was given to secure.⁴

720. Forcible entry and detainer. — This process is not applicable to the case of a mortgagee who has attempted to take possession under a mortgage for a breach of condition, and whose attempt has been repelled by force. The remedy is by a writ of entry. The defendant has the right to have the court inquire and determine how much is due upon the mortgage, and also has a right to have a conditional judgment entered, which, under the practice in Maine and Massachusetts, delays for two months the issue of the execution, and gives a chance for redemption.⁵

721. A mortgagee who has entered for condition broken may maintain trespass for mense profits against one who is in possession of the premises under the mortgagor, and refuses to yield possession, although the entry may not have been sufficient for the purpose of foreclosure.⁶ For an injury to the freehold

¹ *Savage v. Dooley*, 28 Conn. 411; *Rosevelt v. Stackhouse*, 1 Cow. (N. Y.) 122; *Gray v. Jenks*, 3 Mason, 520.

² *Jackson v. Jackson*, 5 Cow. (N. Y.) 173.

³ *Jackson v. Jackson*, *supra*.

⁴ *Smith v. Johns*, 3 Gray (Mass.), 517.

⁵ *Walker v. Thayer*, 113 Mass. 36; *Gerish v. Mason*, 4 Gray (Mass.), 432; *Hastings v. Pratt*, 8 Cush. (Mass.) 121; *Larned v. Clarke*, *Ib.* 29.

⁶ *Northampton Paper Mills v. Ames*, 8 Met. (Mass.) 1; and see *Miner v. Stevens*, 1 Cush. (Mass.) 482.

rather than to the possession, a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor; as for instance for cutting and carrying to market timber trees standing on the mortgaged land. After condition broken the mortgagee's right to possession accrues, and carries with it the right to sue in trespass for such an injury. The possession of the mortgagor is not adverse, and an injury to the freehold is beyond a matter of possession of the mortgagor, and whoever be the wrong-doer, he is amenable to the mortgagee for a violation of his rights.¹

3. *His Liability to Third Persons.*

722. The effect of releasing a part of the mortgaged property.—As between the original parties the release of a part of the premises does not affect the mortgagee's lien upon the residue. This is bound for the whole debt.² But as against others who have liens upon portions of the mortgaged premises, a mortgagee with notice of such liens has no right to release any portion of the mortgaged premises to the injury of the owners of such liens.³ It is only after receiving notice of such liens that he becomes responsible for his acts in releasing portions of the land.⁴

The mortgagee, by releasing one of two parcels of land which are charged with the burden of the incumbrance, may, to the extent of the value of the lot so released, diminish his security; because in such case the purchaser of the other parcel cannot compel the purchaser of the parcel so released to contribute, and the mortgagee who has interfered and discharged a portion of his lien must in effect make contribution, by abating such a proportion of the sum due on the mortgage as the value of the parcel released bore at the time of the execution of the mortgage to the value of both parcels.⁵

A mortgagee who knows that portions of the mortgaged premises have been subsequently conveyed or incumbered is not allowed in equity to release those parts of the land on which he has

¹ Page v. Robinson, 10 Cush. (Mass.) 587; Blair v. Ward, 10 N. J. Eq. (2 Stock.) 99, and cases cited from Maine and New Hampshire. 119; Wolf v. Smith, 36 Iowa, 454.

⁴ Vanorden v. Johnson, 14 N. J. Eq.

² Contant v. Servoss, 3 Barb. (N. Y.) 128. 376.

³ Paxton v. Harrier, 11 Pa. St. 312; ⁵ Parkman v. Welch, 19 Pick. (Mass.) McLean v. Lafayette Bank, 3 McLean, 231.

the only lien, and to enforce his entire claim upon those portions in which others have become interested. Justice may require that the lien of the mortgage be extinguished as to those parts in which subsequent parties have become interested.¹ But if they can be protected without that, he may still enforce his mortgage against the remaining portions of the land, so far as he can be allowed to do so consistently with their protection. If the mortgagor after actual notice of an absolute sale of a portion of the premises by the mortgagor releases other portions of sufficient value to secure his whole claim, the mortgage is held discharged upon that part owned by such subsequent purchaser. If the person subsequently interested be a mortgagee, the first mortgage would be postponed to the second in the application of the proceeds of a foreclosure sale.

Where a mortgagee releases several parcels of land covered by the mortgage, upon payment of amounts proportionate to the value which they bear to the mortgaged debt, and all the remaining lots, except one in possession of a purchaser from the mortgagor, are subsequently sold under foreclosure of the mortgage for amounts not proportionate to the actual value which they bear to the mortgage debt, but without any fault on the part of the mortgagee, the remaining lot is subject to the payment of the balance of the mortgage debt.²

723. What notice affects the mortgagee. — The mortgagee who has actual or constructive notice of the equity of such purchaser must regard it; and therefore if he releases a part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser. But the mere record of a subsequent conveyance by the mortgagor of a part of the premises is not constructive notice of it to him.³ It would not be reasonable to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage.

¹ *Parkman v. Welch*, 19 Pick. (Mass.) Wis. 307; *Straight v. Harris*, 14 Wis. 231; *Deuster v. McCamus*, 14 Wis. 307; 509; *Patty v. Pease*, 8 Paige (N. Y.), 277; *Stevens v. Cooper*, 1 Johns. (N. Y.) Ch. Guion v. Knapp, 6 Ib. 35; *Brown v. 425*; *Guion v. Knapp*, 6 Paige (N. Y.), 35. Simons, 44 N. H. 475; *Wheelwright v. Depeyster*, 4 Edw. (N. Y.) Ch. 232; *Taylor v. Maris*, 5 Rawle (Pa.), 51.

² *Barney v. Myers*, 28 Iowa, 472.

³ *George v. Wood*, 9 Allen (Mass.), 80, and cases cited; *Deuster v. McCamus*, 14

A subsequent purchaser takes his title with full knowledge of the mortgage, and if he wishes to protect himself he should notify the mortgagee of his purchase. The record is constructive notice only to subsequent purchasers, or those claiming under the same grantor.¹

724. Not allowed to release security to the prejudice of a surety.— In like manner, a mortgagee holding a mortgage to secure a debt for which another is liable as surety has no right to release the mortgage and still hold the surety liable; for the surety is entitled to the benefit of the security given by the principal debtor, and the creditor is not allowed, as against him, to do any act impairing or releasing such security.²

725. Nor to the prejudice of a junior mortgagee.— The holder of a junior mortgage upon one of two lots embraced in a prior mortgage may compel the prior mortgagee to resort in the first place to the other lot, upon which there is no other incumbrance;³ but if the other lot be incumbered by a mortgage to another person, the prior mortgagee will be required to satisfy his claim out of the proceeds of both lots, in proportion to the amount which each may produce.⁴

But although generally a second mortgagee has an equitable right to have other security in the hands of the first mortgagee applied to the payment of the mortgage before resorting to the land, when this course is likely to occasion much delay to the prior mortgagee in obtaining satisfaction, the court will decree the satisfaction of his claim from the mortgaged property, but will at the same time provide for the subrogation of the second mortgagee to the other security.⁵

726. The principal creditor entitled to the benefit of a mortgage to a surety.— A mortgage to a surety to secure him is, in effect, a security to the principal creditor, and he is entitled to the benefit of it.⁶ If it be a mortgage of indemnity the surety

¹ Cheever v. Fair, 5 Cal. 337.

⁵ King v. McVickar, 3 Sandf. (N. Y.)

² Hayes v. Ward, 4 Johns. (N. Y.) Ch. 192.

⁶ Moore v. Moberly, 7 B. Mon. (Ky.)

³ Henshaw v. Wells, 9 Humph. (Tenn.) 299; Rice v. Dewey, 13 Gray (Mass.), 47; Dick v. Truly, 1 Sm. & M. (Miss.) Ch.

⁴ Green v. Ramage, 18 Ohio, 428. 557.

cannot enforce it until he has been injured, or has paid the debt for which he was surety ;¹ and in like manner the security does not in the first instance attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the security arises afterward, and comes into existence only when the surety's right to call upon the security becomes fixed.²

But although a mortgage to indemnify a surety attaches to the debt for the benefit of the creditor, this is a secondary use of the security which is to be used primarily for the benefit of the mortgagee ; therefore, if it be taken to indemnify one who is surety on several notes, and is discharged upon some but continues liable upon others, he has the right to use the security for the payment in the first place of those notes upon which he is liable ; while the other notes have the incidental benefit of the remainder of the security.³ For instance, suppose the original security was taken to indemnify a surety against several notes, part of which were attested by a witness and part were not so attested, and that after the lapse of six years the surety was discharged upon the unattested notes by the bar of the statute of limitations, but not discharged upon the others ; he is entitled to pay out of the security the notes upon which he is still liable ; not only because he has a superior equity, but because he stands upon the ground of another rule of law, that of two or more having equal claims in equity, he who has a legal title is preferred.⁴

A mortgagee having a specific demand secured by a mortgage upon his debtor's property, and other claims not secured upon a conveyance by the debtor of his equity of redemption, and other property in trust to pay all his debts, is entitled to secure the whole amount of his mortgage out of the land, and to come in *pro rata* with other creditors as to his other claims.⁵

727. If a mortgagee release the mortgagor from personal liability, he thereby diminishes the security of a subsequent purchaser of part of the premises, and therefore the lien of the mort-

¹ Hall v. Cushman, 16 N. H. 462.

² Jones v. Quinnipiack Bank, 29 Conn.

25. See, however, McLean v. Lafayette Bank, 3 McLean, 587.

³ Eastman v. Foster, 8 Met. (Mass.)

19. See Miller v. Wack, 1 N. J. Eq. (Sax.) 204.

⁴ Eastman v. Foster, *supra*, per Shaw, C. J.

⁵ Bell v. Hammond, 2 Leigh (Va.), 416.

gage, so far as the rights of such subsequent purchaser are concerned, is discharged. The fact that another person at the same time assumed the debt does not prevent the discharge, if the subsequent purchaser did not assent to the substitution.¹ This rule is applicable as well to the case of a subsequent mortgagee, though in some cases the effect of the release of the mortgagor's personal liability might be to give the second mortgage priority over the first, instead of absolutely discharging the premises from the lien.²

728. A mortgagee having other security for the payment of the debt secured by the mortgage, and having notice of a subsequent mortgage upon the same premises, is bound in equity to apply in the first instance to the payment of the debt the security in which the subsequent mortgagee does not share: and if the prior mortgagee under such circumstances releases the other security, his mortgage is to the extent of the value of that security satisfied so far as such subsequent mortgagee is concerned.³ In like manner, if he also holds personal property as security for the same debt, he may be compelled by the heir or widow of the mortgagor to resort in the first instance to the personal property, so as to relieve the land to that extent from the burden of the debt.⁴

Upon the same principle, a building association holding a mortgage upon the real estate of one of its stockholders, whose stock is also pledged as collateral security for the loan, cannot have recourse to the mortgaged premises as against one holding a second mortgage upon them, until it has sold the stock and applied the proceeds of it to the payment of the mortgage debt.⁵ This equity cannot be defeated by a levy upon the stock under a judgment obtained by a creditor against the mortgagor. As against such creditor, the holder of a subsequent mortgage is entitled to have the stock sold and applied to the payment of the first mortgage before recourse is had to the land.⁶ The court

¹ *Coyle v. Davis*, 20 Wis. 564.

² *Sexton v. Pickett*, 24 Wis. 346.

³ *Washington Build. & Loan Ass'n v. Beaghen*, 27 N. J. Eq. 98; *Herbert v. Mich. Build. & Loan Ass'n*, 2 C. E. Green (N. J.), 497.

⁴ *Harrow v. Johnson*, 3 Mete. (Ky.) 578; *Davis v. Rider*, 5 Mich. 423.

⁵ *Red Bank Mut. Build. & Loan Ass'n, v. Patterson*, 27 N. J. Eq. 223.

⁶ *Phillipsburg Mut. Loan & Build. Ass'n v. Hawk*, 27 N. J. Eq. 355; and see cases cited.

may order a senior mortgagee holding other security for his claim to exhaust that before resorting to the security covered by the junior mortgage.¹

729. So in like manner upon the insolvency or bankruptcy of the mortgagor, the mortgagee may do as he pleases about proving his claim against the estate of the debtor. He may, if he choose, pay no regard to his personal claim and rely upon the land alone.² Or, if his security be inadequate, he may have it valued, and prove his demand for the balance. But if he prove his whole claim against the estate of his debtor, without reference to his mortgage, he thereby waives his mortgage security; and in this respect the law is the same when upon the death of the mortgagor his estate is represented insolvent, and the mortgagee has his whole claim allowed, and receives a dividend upon the whole; he thereby releases his security.³ It is by force of statute, however, that a mortgagee is prevented from proving his whole claim against the estate of his debtor, either during his lifetime or after his decease, and also resorting to the mortgage for the balance. Upon the death of the mortgagor, the holder of the mortgage is not bound to seek payment of his debt out of the personal estate, by presenting his claim to the personal representative, and the only effect of his not doing so within the time allowed is to deprive him of all benefit of the personal estate. He may resort to the land after his claim against the personal estate of the deceased is barred.⁴

730. As against a subsequent mortgagee the parties to a prior mortgage cannot change its terms. — A junior mortgagee has the right upon the maturity of the senior mortgage to redeem it, and this right cannot be affected by an agreement between the parties to such prior mortgage, fixing upon a higher rate of interest than that specified in the mortgage.⁵ A subsequent mortgagee is presumed to have acquired his interest with reference to the existing liens as they appear of record, and his

¹ *Swift v. Conboy*, 12 Iowa, 444.

² *Bennett v. Calhoun Asso.* 9 Rich. (S. C.) Eq. 163; *Walker v. Baxter*, 26 Vt. 710.

³ *Hooker v. Olmstead*, 6 Pick. (Mass.) 481.

⁴ *Grafton Bank v. Doe*, 19 Vt. 463;

Inge v. Boardman, 2 Ala. 331; *Trustees of Jefferson College v. Dickson*, 1 Freem. (Miss.) Ch. 474; *Patton v. Page*, 4 Hen. & M. (Va.) 449.

⁵ *Gardner v. Emerson*, 40 Ill. 296.

rights cannot be prejudiced by private arrangements between the parties.¹

731. Where a homestead is included with other realty in a mortgage, there is no implied obligation on the mortgagee that he shall first exhaust his remedy on the land other than the homestead; but he may release the other land and still maintain his lien on the homestead.² "It is said that the homestead belongs to, and is designed by the law for the family, and that their rights are paramount to the rights of creditors. We cannot assent to the claim as thus broadly stated. It means that when a creditor takes a mortgage on the homestead and other property, though nothing is expressed, there is an implied agreement to consider the homestead as a sort of secondary security, a security for security, that the other property mortgaged is the primary security, and that if that proves insufficient, and *only* when that proves insufficient can the lien on the homestead be enforced. That partners may make such a contract is unquestionable: that the legislature may establish such a rule, is probable."³ Thus, in Iowa the rule is so established by reason of the provisions of the Code of that state.⁴ And it was there held that when one member of a partnership mortgaged his homestead to secure a partnership debt, after an assignment by the firm for the benefit of creditors, the mortgagee must first look to the partnership assets, and then to the homestead only for the deficiency.⁵

732. Junior mortgagee not affected by any arrangement between the parties to the prior.—It is clear enough that rights of subsequent mortgagees cannot be defeated by any arrangement between the first mortgagee and the mortgagor, or by any adjudication of their respective rights. But when the first mortgage is in the form of an absolute deed, it is sometimes difficult to determine what the rights of subsequent incumbrancers are, or how these rights may be affected by subsequent dealings of the grantor and the grantee. This is illustrated by a case in Iowa,⁶ where the owner of land sold it and received payment for

¹ Whittacre v. Fuller, 5 Minn. 508.

² Chapman v. Lester, 12 Kans. 592.

³ Per Brewer, J., in Chapman v. Lester,

supra.

⁴ Twogood v. Stephens, 19 Iowa, 405.

⁵ Dickson v. Chorn, 6 Iowa, 19.

⁶ Davis v. Rogers, 28 Iowa, 413.

it, but afterwards loaned a sum of money to the purchaser, and having made no deed of the land, it was agreed that he should retain the title of the land, and should convey it upon payment of the sum loaned. Subsequently, and while the purchaser had no title other than this contract, he mortgaged a part of the land to secure a debt. Several years after this the purchaser brought an action upon the contract, asking for a conveyance of the land or judgment for the amount of the purchase money paid upon it, in case the conveyance could not be enforced. A judgment was rendered in behalf of the purchaser, which was satisfied by the payment of a sum of money. Soon after this a suit was brought to foreclose the mortgage, and a decree of foreclosure was sustained. It was said that the transaction between the vendor and purchaser of the land amounted to a mortgage; that the purchaser could have conveyed his interest or estate in the land absolutely, and that he could mortgage it as well. It is plain that the first mortgagee, by payment of the judgment against him, acquired only that interest in the land which the mortgagor could have conveyed to him by deed. If the subsequent mortgage was valid when it was made, it could not be defeated by such conveyance or judgment; and accordingly it was held that the first mortgagee acquired the mortgagor's interest subject to the subsequent mortgage, and that a decree should be entered for a sale of the land to satisfy it.¹

733. When a second mortgagee of a portion of the premises takes subject to the whole amount of a prior mortgage.— In view of the rule that a conveyance of a portion of the mortgaged premises by warranty deed leaves the remainder of the premises primarily liable in equity for the whole amount of the mortgage, it should be borne in mind that one taking a mortgage of such residue takes it, in like manner, subject to the whole amount of the prior mortgage.² The mortgagor can, of course, give no greater rights than he himself possesses. He has no equity to compel the purchaser to contribute to the payment of the prior mortgage, and therefore he cannot confer upon his second mortgagee of the remainder any such equity.

There may be circumstances, however, under which a subsequent

¹ Davis v. Rogers, *supra*.

² Kellogg v. Rand, 11 Paige (N. Y.), 59.

mortgagee may be entitled to his mortgagor's equity to compel another person to discharge a prior mortgage; as for instance where, upon the dissolution of a partnership, one of the partners has agreed to pay a certain partnership debt secured by a mortgage upon the land of the other partner, and the latter has afterwards mortgaged it again.¹

734. When the mortgagee is estopped to assert his mortgage. — A mortgagee who stands by at an auction sale of the property by the mortgagor, and hears the announcement made that the purchaser will get an unincumbered title, and says nothing, is estopped from setting up his mortgage against one who buys at such sale and pays his money under the impression that he is getting a good and unincumbered title, even though the mortgage was duly recorded at the time of the sale. To allow the mortgage to be set up would be a fraud on the purchaser, although the mortgagee had no fraudulent intent in not correcting the announcement.²

In like manner, if by a statement that his mortgage is discharged he lead another to buy the property, or to take a mortgage upon it, he cannot afterwards, as against such purchaser or mortgagee, set up his mortgage.³

A mortgagee may be estopped from asserting his mortgage for a larger sum than he states to a purchaser of the equity of redemption to be due him, especially if he uses any active efforts to induce a sale of the property. But the proof of the facts out of which the estoppel is claimed to arise should be clear and satisfactory. If the statement of the mortgagee as to the amount due is a mere matter of opinion, and the purchaser relies upon the assurances of the mortgagor from whom he purchases, and he might by the use of reasonable diligence ascertain the true amount of the incumbrance, the mortgagee is not estopped from claiming the amount due him as against the purchaser. If a written agreement as to the amount of the incumbrance be taken from the mortgagee, before completing the purchase, the latter will not be allowed to prove verbal statements and assurances made by the

¹ *Kinney v. M'Cullough*, 1 Sandf. (N. Y.) Ch. 370. ³ *Lasselle v. Barnett*, 1 Blackf. (Ind.) 150.

² *Markham v. O'Connor*, 52 Ga. 183.

mortgagee as to the nature and extent of the incumbrance, unless a mistake be shown in the agreement as written; and on the other hand, the mortgagee will be estopped from claiming any more than the written agreement calls for.¹

¹ Preble v. Conger, 66 Ill. 370.

CHAPTER XVII.

A PURCHASER'S RIGHTS AND LIABILITIES.

1. *Purchase Subject to a Mortgage.*

735. The clause in a deed referring to the existence of a prior mortgage is of much importance in other ways than in determining whether the purchaser engages to pay the mortgage, or merely buys subject to it. In the first place, it may qualify the grantor's liability upon the covenants of the deed against incumbrances by showing the existence of the mortgage, and that as between him and the grantee the latter is to pay it.¹ It may prevent, by a statement as to what an incumbrance upon the property is, any liability on the part of the grantor to the penalties imposed by statute upon one who sells incumbered property without disclosing the incumbrance. It may preclude the grantee from impeaching the validity of the mortgage existing upon the property conveyed.² It may subject the land to the burden of the mortgage without imposing upon the grantee any personal liability to pay it.³ It may have an important bearing upon the liability of the grantor in case an extension of the mortgage is afterwards made without his consent.⁴ It may render the grantee directly liable for the mortgage debt to the mortgagee, or it may make him liable merely to his grantor.⁵ Moreover, under this clause arise questions of notice affecting others who may claim under the deed.⁶ The mode, therefore, in which this clause is expressed is of extreme importance, both in the drawing of the instrument and in the interpretation of its effect.

One having purchased land by a deed with covenants of seisin

¹ Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97.

² Ritter v. Phillips, 53 N. Y. 586.

³ Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97.

⁴ Calvo v. Davies, 8 Hun (N. Y.), 222.

⁵ Garnsey v. Rogers, 47 N. Y. 233; Binsse v. Paige, 1 Abb. (N. Y.) App. Dec. 138.

⁶ Campbell v. Vedder, 1 Abb. (N. Y.) App. Dec. 295.

and warranty mortgaged it to his grantor for the purchase money by a deed containing the same covenants. Being evicted by a paramount title, he brought an action against his grantor on his covenant of seisin. The action was held to be maintainable, the mortgagor's covenants not operating as a rebutter.¹

When land is conveyed "subject to" a mortgage, and the amount of it is deducted from the consideration, with the intention that it shall be paid by the grantee,² it is important that the mortgage be excepted from the covenants of the mortgage, otherwise the grantor may be held to have covenanted against the incumbrance, and to have made himself liable for its payment.³ The fact that the incumbrance is mentioned in a deed to which reference is made does not avail to qualify the covenants of a deed.⁴ Oral evidence that the parties intended or agreed that the incumbrance should be excepted from the covenants is not admissible, because its effect would be to vary or control the deed.⁵

736. One who purchases an equity of redemption by a deed without covenants takes the estate charged with the payment of the mortgage debt. It is presumed, in the absence of a special contract or of any unusual circumstance, that the amount paid was the price of the property purchased, less the amount of the mortgage, and it would be for the purchaser, and not the seller, to discharge the incumbrance.⁶ In such case therefore the purchaser cannot pay off the debt, and then keep the mortgage alive by taking an assignment of it to himself, and set it off against an unpaid balance still due from him to his vendor.⁷ If it appear that the incumbrances were not deducted from the consideration paid, and the purchaser has given back a mortgage for the purchase money, although his deed be without covenants, and he

¹ § 68; *Sumner v. Barnard*, 12 Met. (Mass.) 459.

² A clause obligating the grantee to assume an existing mortgage may be as follows: "Said premises are hereby conveyed subject to a certain mortgage, dated, &c., and recorded, &c., and of which the sum of \$— is now due, which mortgage the said grantee, his heirs and assigns, are to assume and pay, the said amount forming a part of the above-named consideration." *Crocker's Com. Forms*, 38.

³ *Estabrook v. Smith*, 6 Gray (Mass.), 572. In this case the covenant against incumbrances excepted the mortgage, but the covenant of warranty did not; and it was held that the mortgagor was bound to pay it.

⁴ *Harlow v. Thomas*, 15 Pick. (Mass.) 66.

⁵ *Spurr v. Andrew*, 6 Allen (Mass.), 420.

⁶ *Shaler v. Hardin*, 25 Ind. 386.

⁷ *Atherton v. Toney*, 43 Ind. 211.

knew of the existence of the incumbrances, he may pay them off, and deduct the amount from the mortgage he has given.¹

When one purchases land expressly subject to a mortgage, the land conveyed is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it.² The difference between the purchaser's assuming the payment of the mortgage, and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged with the payment of the debt, and is not allowed to set up any defence to its validity, as for instance that the mortgage is void wholly or in part on account of usury.³

If the equity of redemption be sold on execution, the purchaser cannot either legally or equitably claim that the mortgagor shall pay off the mortgage. The purchase is made subject to the mortgage, and the premises as between the purchaser and the mortgagor, become primarily liable for the debt.⁴

737. One who has purchased subject to a mortgage is not entitled to the benefit of collateral security placed in the hands of the mortgagee by the vendor after the execution of the mortgage. By purchasing in this way, the land becomes the primary fund for the payment of the mortgage debt, and the purchaser has nothing to do with any other security taken for the debt not a part of the original transaction.⁵

The principles of equity in regard to the marshalling of securities are not applicable to the case of a mortgagee and a subsequent purchaser of the equity of redemption; but are confined to cases where two or more persons are creditors of the same debtor, and have successive demands upon the same property, the one prior in right having other securities. The purchaser takes what he purchases — the equity of redemption, and nothing more. He acquires no equitable interest in other securities held by the mort-

¹ *Wolbert v. Lucas*, 10 Pa. St. 73.

² *Sweetzer v. Jones*, 35 Vt. 317.

³ *Green v. Turner*, 38 Iowa, 112; *Greither v. Alexander*, 15 Iowa, 470; *Perry v. Kearns*, 13 Iowa, 174.

⁴ *Russell v. Allen*, 10 Paige (N. Y.), 249; *Vanderkemp v. Shelton*, 11 Ib. 28;

S. C. Clark Ch. 321.

⁵ *Brewer v. Staples*, 3 Sandf. (N. Y.) Ch. 579.

gagee,¹ and he has no right to have the mortgage debt charged upon the mortgagor personally in exoneration of the land.²

738. Such purchaser not personally liable for the debt. — If the purchaser buy a mere equity of redemption, he is not personally liable for the mortgage debt. He may give up the property at any time in satisfaction of the lien.³ The mortgage debt remains an incumbrance upon the estate, and a debt of the mortgagor; but not a debt of the person buying. In the absence of a special agreement to assume the mortgage, the purchaser is not personally liable for it.⁴

739. The purchase of a paramount title by the grantee of the mortgagor does not enure to the benefit of the mortgagee, nor does it operate in any way to confirm the mortgage title.⁵

2. *Assumption of Mortgage by Purchaser.*

740. Generally, one purchasing land subject to an existing mortgage does not merely purchase the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage as a part of the purchase money of it. The vendor, especially if he be also the mortgagor, usually requires such an undertaking on the part of the purchaser, so that the debt may be a charge upon him, and not merely a charge upon the land. As between these parties the purchaser thus becomes primarily liable, and the mortgagor only a surety for the payment of the debt. The mortgaged property, moreover, becomes, as between them, the primary fund for the payment of the debt. The purchaser having made the mortgage debt his own debt cannot take an assignment of the mortgage, and hold it as an independent title, but it is thereupon merged and discharged.⁶ If a senior mortgagee becomes the purchaser, and assumes the payment of a jun-

¹ *Stevens v. Church*, 41 Conn. 369.

² *Cherry v. Monro*, 2 Barb. (N. Y.) Ch. 618; *Brewer v. Staples*, 3 Sand. (N. Y.) Ch. 579; *Mathews v. Aikin*, 1 N. Y. 595.

³ *Tichenor v. Dodd*, 3 Green (N. J.) Ch. 454, and cases cited.

⁴ *Johnson v. Monell*, 13 Iowa, 300.

⁵ *Knox v. Easton*, 38 Ala. 345.

⁶ *Miller v. Watson*, 1 Sw. 374; *Lilly v. Palmer*, 51 Ill. 331; *Russell v. Pistor*, 7 N. Y. 171; *Jumel v. Jumel*, 7 Paige (N. Y.), 591; *Blyer v. Monholland*, 2 Sandf. (N. Y.) Ch. 478; *Gilbert v. Averill*, 15 Barb. (N. Y.) 20; *Andrews v. Wolcott*, 16 Ib. 21.

ior mortgage, his own mortgage is merged and discharged, so that the junior mortgage takes precedence.¹

When the lands have thus become the primary fund for the payment of the debt, subsequent purchasers are chargeable with notice of this equitable right to resort to the land, equally as if their own deeds in terms disclosed that they were to take the premises subject to the payment of the mortgage.²

One who has assumed the payment of a mortgage cannot defend against a claim of dower by the widow of the grantor, by setting up an assignment of it to himself upon payment of the amount due upon it, she having joined to release dower in the mortgage, but not in the deed to him.³ In like manner, one who has assumed the payment of two mortgages upon the granted premises cannot, by taking an assignment of the first mortgage, defend against the second.⁴

741. The mortgagor becomes a surety.—A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety;⁵ but the mortgagee may treat both as principal debtors, and may have a personal decree against both.⁶ The mortgagee may release the mortgagor from his personal liability in such case without discharging the land, or the grantee who assumed the debt.⁷ He may, by his dealings with the purchaser and mortgagor, recognize the former as the principal debtor, and the latter as surety towards himself.

742. When extension discharges the mortgagor.—A purchaser having assumed the payment of an existing mortgage, and thereby become the principal debtor and the mortgagor a surety of the debt merely, an extension of the time of payment of the

¹ *Fowler v. Fay*, 62 Ill. 375.

² *Weber v. Zelnut*, 30 Wis. 283; *Freeman v. Auld*, 44 N. Y. 50; S. C. 37 Barb. 587, and cases cited; *Calvo v. Davies*, 8 Hun (N. Y.), 222.

³ *McCabe v. Swap*, 14 Allen (Mass.), 188.

⁴ *Converse v. Cook*, 8 Vt. 164.

⁵ *Wales v. Sherwood*, 52 How. (N. Y.) Pr. 413; *Calvo v. Davies*, 8 Hun (N. Y.), 222; *Comstock v. Drohan*, 8 Ib. 373; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35;

Trotter v. Hughes, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438; *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Johnson v. Zink*, 52 Ib. 396.

⁶ *Corbett v. Waterman*, 11 Iowa, 86; *Thompson v. Bertram*, 14 Iowa, 476; *Hebert v. Doussan*, 8 La. Ann. 267.

⁷ *Tripp v. Vincent*, 3 Barb. (N. Y.) Ch. 613.

mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it. The holder cannot enlarge the time of payment and protect himself, by reserving his rights against the surety in the agreement of extension. Such a reservation has no effect unless the mortgagor agree to it.¹

743. When the purchaser assumes a proportionate part of the mortgage.—A purchaser of a portion of the mortgaged premises, who assumes the payment of a proportionate part of the mortgage debt, is bound to pay such part in exoneration of the residue.²

A purchaser of part of a tract of land, who pays off a mortgage upon the whole, is entitled to be subrogated to the mortgage;³ because the burden of such a mortgage rests only in part upon his land, and is in part to be borne by the owners of the remaining portions of it.

But on the other hand, if one purchase a portion of the mortgaged premises, under an agreement that he will assume and pay the whole of the mortgage debt, then the whole burden of the debt is annexed to that portion by express contract.⁴

A purchaser of a portion of the estate subject to a mortgage has no equity to have his land relieved from the burden of the mortgage, as against a subsequent purchaser, when it was a part of his contract of purchase that he should pay the purchase money directly in satisfaction of the mortgage. On the contrary, the subsequent purchaser has an equitable right to have the purchase money so applied in exoneration of his own land; and as against him a subsequent agreement between the mortgagor and the first purchaser making a different application of the purchase money is invalid.⁵

744. The purchaser is not allowed to defend against the mortgage he has assumed to pay on the ground that it was made without consideration, and therefore not valid against his

¹ *Calvo v. Davies*, 8 Hun (N. Y.), 222. See *Corbett v. Waterman*, 11 Iowa, 86.

³ *Salem v. Edgerly*, 33 N. H. 46; *Champlin v. Williams*, 9 Pa. St. 341.

² *Torrey v. Bank of Orleans*, 9 Paige (N. Y.), 649; *S. C. 7 Hill* (N. Y.), 260; *Hilton v. Bissell*, 1 Sand. (N. Y.) Ch. 407.

⁴ *Welch v. Beers*, 8 Allen (Mass.), 151.

⁵ *Baring v. Moore*, 4 Paige (N. Y.), 166.

grantor ; the latter having appropriated a portion of the purchase price of the land to the payment of a sum of money to a third person, and made it a charge upon the land, it does not matter whether there was any legal obligation upon him to pay it, or whether it was at the time of the sale a lien upon the land ; his grantee, having undertaken to pay it, is precluded from assailing its validity.¹

One who has assumed the payment of a mortgage cannot contest the validity of it, or show that the amount assumed by him is not due upon it.² He cannot object to the mortgage on the ground of an alleged defect in the manner of execution, as that it was executed by an attorney whose authority is not shown, when the mortgagor himself does not interpose that objection.³

Although the consideration of the mortgage assumed has not been fully paid, the grantee cannot redeem except by paying the mortgage in full. Thus, where a mortgage was given to secure a loan and certain advances which the mortgagee agreed to make, one claiming under the grantee sought to redeem on paying the amount of the loan secured, without the advances which had not at that time been made ; and in fact the condition on which they were to be made had not been performed ; but it was determined that the plaintiff must pay the amount of the mortgage in full in order to redeem, and that the mortgagee would hold the balance above the amount advanced by him in trust for the mortgagor, or for the holder of the agreement for the advances, when that has been assigned.⁴

It has even been held that one who has bought subject to a mortgage, without assuming the payment of it so as to make himself personally liable, cannot contest the validity of the mortgage lien. When the amount of the mortgage has been deducted from the amount of the consideration of the purchase, it is in effect an agreement that so much of the purchase money shall be paid to the person holding the mortgage, and the mortgage is thus made a lien to the full amount of its face, although the mortgagee has, in fact, paid only a part of the consideration, or although the mortgage is subject to other defences in the hands of the mort-

¹ Crawford v. Edwards, 33 Mich. 354.

Ill. 501 ; Greither v. Alexander, 15 Iowa,

² Ritter v. Phillips, 53 N. Y. 586.

470.

³ Pidgeon v. Trustees of Schools, 44

⁴ Cox v. Hoxie, 115 Mass. 120.

gagor. By conveying the land subject to a mortgage, the mortgagor provides for its payment in full out of the purchase money.¹

745. Such purchaser cannot set up usury. — It is no defence on behalf of such purchaser that the mortgage assumed by him is void for usury.² But one who buys land with the expressed intention on his part, and on the part of the grantor, to avoid a previous mortgage on the ground of usury, may take this defence.³ When the purchaser has in no way agreed to pay the mortgage debt, or agreed that it should be paid out of the land, he may take advantage of usury in the mortgage to avoid it.

A voluntary assignee of the mortgagor for payment of his debts may set up usury in the mortgage.⁴

746. When a purchaser may contest the mortgage. — But one who has bought the equity of redemption by a deed with covenants of warranty has a right to prove a payment by the mortgagor, by which the land is relieved wholly or in part from the incumbrance.⁵

When the description of the premises as subject to a mortgage is merely for the purpose of protecting the grantor from liability upon his covenants, the grantee is not charged with the payment of the mortgage debt. Accordingly it has been held that a recital in a deed that the property is subject to a mortgage, which is excepted out of the covenants in the deed, does not estop the grantee to dispute the validity of the mortgage.⁶

747. Purchase under execution sale. — Where by statute

¹ *Freeman v. Auld*, 44 N. Y. 50; S. C. 37 Barb. 587, and cases cited; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435. See, however, *Hartley v. Tatham*, 2 Abb. (N. Y.) Dec. 333; 10 Bosw. 273, holding that such grantee may show part payment of the mortgage. See § 746.

² *DeWolf v. Johnson*, 10 Wheat. 392; *Cramer v. Lepper*, 26 Ohio St. 59; *Busby v. Finn*, 1 Ib. 409; *Beerce v. Barstow*, 9 Mass. 45; *Hartley v. Harrison*, 24 N. Y. 170, and cases cited; *Sands v. Church*, 6 N. Y. 347; *Shufelt v. Shufelt*, 9 Paige (N. Y.), 137; *Frost v. Shaw*, 10 Iowa, 491.

³ *Newman v. Kershaw*, 10 Wis. 333; *Ludington v. Harris*, 21 Wis. 239.

⁴ *Pearsall v. Kingsland*, 3 Edw. (N. Y.) 195.

⁵ *Williams v. Thurlow*, 31 Me. 392. See *Hartley v. Tatham*, 2 Abb. (N. Y.) Dec. 333; S. C. 1 Keyes, 222; 10 Bosw. 273.

⁶ *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554. The grantor in this case was not the mortgagor, though this fact was not noticed in the opinion. See § 744.

only incumbered land can be sold on execution, an execution in other cases being levied upon the land, a purchaser of an equity of redemption on execution is estopped to deny the existence and validity of the mortgage, because he bought only an equity of redemption, and if there is no mortgage there can be no such equity. When, however, there are more mortgages than one, if any of them are fraudulent, or void, or fully paid, the purchaser on execution may contest such and redeem from the valid incumbrances.¹

A grantee who has not agreed to pay the mortgage debt is not affected by an agreement to do so made by his grantor. But after the first grantee has covenanted to pay the mortgage debt, a like covenant in his deed to the second grantee makes the latter personally liable to pay it, in exoneration of the mortgagor, who is in equity entitled to the benefit of such undertaking in the same manner, as if it had been recited in a conveyance by him directly to the second grantee.²

3. *Personal Liability of Purchaser.*

748. A deed which is merely made subject to a mortgage specified, does not alone render the grantee personally liable for the mortgage debt. To create such liability there must be such words as will clearly import that the grantee assumed the obligation of paying the debt.³ It is not necessary that any particular formal words should be used,⁴ but that the intention to impose upon the grantee this obligation should clearly appear.⁵ A purchaser of land accepting a deed expressly conveying it subject to a mortgage, and excepting it from the covenants, is not himself personally liable to pay it, unless he covenants to do so. The

¹ *Stebbins v. Miller*, 12 Allen (Mass.), 591. See *Russell v. Dudley*, 3 Met. (Mass.) 147-151, per Shaw, C. J.

² *Torrey v. Bank of Orleans*, 9 Paige (N. Y.), 649.

³ *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Strong v. Converse*, 8 Allen (Mass.), 557; *Drury v. Tremont Improvement Co.* 13 Ib. 168, 171; *Bumgardner v. Allen*, 6 Munf. (Va.) 439; *Fowler v. Fay*, 62 Ill. 375; *Comstock v. Hitt*, 37 Ill. 546; *Dunn v. Rodgers*, 43 Ill. 260; *Collins v. Rowe*, 1 Abb. (N. Y.) N.

C. 97; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438; *Binsse v. Paige*, 1 Keyes (N. Y.), 87; S. C. 1 Abb. App. Dec. 138; *Stebbins v. Hall*, 29 Barb. (N. Y.) 524; *Tillotson v. Boyd*, 4 Sandf. (N. Y.) 516; *Murray v. Smith*, 1 Duer (N. Y.), 412; *Johnson v. Monell*, 13 Iowa, 300; *Hull v. Alexander*, 26 Iowa, 569.

⁴ *Belmont v. Coman*, 22 N. Y. 438.

⁵ *Stebbins v. Hall*, 29 Barb. (N. Y.) 529.

land in such case is primarily liable as between the vendor and purchaser; and the vendor is liable for any deficiency after a foreclosure sale fairly made.¹ If such purchaser by collusion with the mortgagee buy the land at the foreclosure sale for a sum less than its value, and less than the mortgage debt, the vendor may have the sale set aside; and such collusion would be a defence in a suit against him for the deficiency.²

When the mortgage has been thus assumed by a purchaser he may be made a party to a proceeding to foreclose, and a personal judgment had against him; or he may be sued on his personal liability without any proceeding to foreclose.³

It is unusual for the grantor to take any note or other security from a grantee who has assumed the payment of a mortgage; but if notes be taken for the amount of the debt assumed, in the absence of fraud or undue advantage on the part of the grantor, a court of equity will not compel the surrender of the notes, or inquire into the authority of the grantor's agent who took them, but will leave the purchaser to his remedy at law.⁴

749. An agreement that the amount of a mortgage upon the granted premises shall be paid as a part of the purchase money is in effect an assumption to pay the mortgage, and not merely a taking of the property subject to the mortgage. The mortgage in such case is charged upon the purchase money, and not upon the land merely.⁵ So much of the consideration as is requisite to pay the mortgage is taken from the consideration and appropriated by the parties to the payment of the mortgage, and equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt. If he be compelled to pay it, he may in equity compel the purchaser to refund the money so paid. There is an implied promise on the part of the purchaser to pay the mortgage when it is due, or if it be already due, to pay it forthwith, or within a reasonable

¹ *Johnson v. Zink*, 51 N. Y. 333, and cases cited.

² *Cleveland v. Southard*, 25 Wis. 479.

³ *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 87; *Moses v. Clerk of Dallas Dist. Court*, 12 Iowa, 140; *Burr v. Beers*, 24 N. Y. 178.

⁴ *Dorr v. Peters*, 3 Edw. (N. Y.) 132.

⁵ *Thayer v. Torrey*, 37 N. J. L. 339; *Tichenor v. Dodd*, 3 Green (N. J.) Ch. 454. In the latter case the terms of the mortgage were, "subject to the payment of a certain mortgage, &c., which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid."

time ;¹ and the burden of proof is upon the purchaser who has assumed a mortgage and claims that he has performed his obligation, to show that he has done so.²

A stipulation that the conveyance is made "subject to the payment" of an outstanding mortgage, or any equivalent expression which clearly implies an obligation intentionally created by the one party and assumed by the other, will constitute a personal obligation for its payment.³

750. Even a verbal promise by a purchaser to assume and pay a mortgage is valid, and may be enforced in equity not only by the grantor but by the holder of the mortgage.⁴ A covenant in the deed that the premises are free from incumbrances, or a recital that the consideration had been paid in full, does not estop either the grantor or the holder of the mortgage from proving the agreement and recovering upon it.⁵

The assumption of the payment may be proved by parol evidence, although the deed to the purchaser contains covenants of warranty, and makes no mention of the mortgage, or is simply subject to it.⁶

The owner of a large lot of land, subject to a mortgage, conveyed a portion of it with covenants of warranty against the mortgage. Subsequently the grantee offered to purchase the residue at a stated price, and to assume as part of it the debt secured by the mortgage, and to pay the balance in money. This offer was accepted, and a deed given in which the consideration named was simply the value of the equity of redemption, and which conveyed the land subject to the mortgage, and contained a general covenant against incumbrances except this mortgage. The purchaser thus took the land last purchased, subject to the mortgage. The deed did not state that he assumed the debt, nor did it have any provision to that effect, and therefore the mere acceptance of the deed did not make him personally liable to pay the debt or discharge the incumbrance. In the absence of other evidence, he merely purchased the equity of redemption.

¹ *Braman v. Dowse*, 12 Cush. (Mass.) 227.

² *Jewett v. Draper*, 6 Allen (Mass.), 434.

³ *Stebbins v. Hall*, 29 Barb. (N. Y.) 524.

⁴ *Bolles v. Beach*, 2 Zab. N. J. 680; *Wilson v. King*, 23 N. J. 150.

⁵ *Wilson v. King*, *supra*.

⁶ *Bowen v. Kurtz*, 37 Iowa, 239.

But having by his proposal to purchase assumed the payment of the mortgage, it became his duty to the grantor to pay it. Moreover, the grantor was released by this agreement from the covenant of his first deed against the mortgagee.¹

A letter of a second mortgagee to the holder of the prior mortgage, which was due, saying that he was willing to agree to see him paid \$500 on account of the first mortgage within sixteen months, was held a promise to pay this sum.²

751. When purchaser bound to indemnify the mortgagor.—But whenever the mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any covenant or agreement to pay it, he is bound to that extent to indemnify the grantor. The law implies a promise to that effect from the nature of the transaction.³

The acceptance of a deed which states that the grantee is to pay a mortgage existing on the premises implies a promise on his part to pay the debt, and he is liable personally in a foreclosure suit.⁴ It does not matter, so far as concerns the liability of purchaser in such case, that his deed was only intended as a security for a debt.⁵

752. The grantee is bound by accepting the deed.—To create a liability on the part of the grantee to pay an existing mortgage, it is not necessary that he should sign the deed or any obligation;⁶ his acceptance of a deed imposing this obligation upon him is all that is necessary.⁷

By the acceptance of a deed which provides that the grantee shall assume and pay a specified mortgage, he binds himself as effectually as he would by executing the deed himself as an inden-

¹ *Drury v. Tremont Improvement Co.* 13 Allen (Mass.), 168.

² *Colgin v. Henley*, 6 Leigh (Va.), 85.

³ *Townsend v. Ward*, 27 Conn. 610; *Dorr v. Peters*, 3 Edw. (N. Y.) 132; *Marsh v. Pike*, 1 Sandf. (N. Y.) Ch. 210; *Blyer v. Monholland*, 2 Ib. 478; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Scott v. Featherston*, 5 La. Ann. 306; *Schlatre v. Greaud*, 19 Ib. 125; *Thompson v. Thomp-*

son, 4 Ohio St. 333; *Stevenson v. Black*, 1 N. J. Eq. (Sax.) 338; *Klapworth v. Dressler*, 13 N. J. Eq. (2 Beas.) 62.

⁴ *Bishop v. Douglass*, 25 Wis. 696.

⁵ *Ricard v. Sanderson*, 41 N. Y. 179.

⁶ *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, and cases cited.

⁷ *Spaulding v. Hallenbeck*, 35 N. Y. 204; aff'g 39 Barb. 79; 30 Ib. 292; *Wales v. Sherwood*, 1 Abb. (N. Y.) N. C. 101, note.

ture.¹ This provision becomes an express agreement on his part for the fulfilment of which he is personally liable not only to his grantor, but the benefit of it enures to the mortgagee who may enforce it directly against such purchaser.² When foreclosure is made by an equitable suit, the mortgagee may treat both the vendor and purchaser as principal debtors to him, and may have a personal decree against either or both of them.

753. A married woman is liable on her covenant to assume a mortgage made in a deed of real estate to her own separate use or benefit. It is a covenant for the benefit of her separate estate, or to pay a portion of the purchase money of real estate conveyed to her.³

754. What will avoid the purchaser's liability.—Such purchaser cannot avoid his liability to pay the mortgage, on the ground that through a mistake in the description he acquired no legal title to the land intended to be conveyed, if he obtained possession of it under his deed, and the right by virtue of it to have the mistake corrected.⁴ But it is a good defence that the purchaser's grantor had no title to the property; and that he assumed the payment of the mortgage through the false and fraudulent representations of his grantor.⁵

755. The ground upon which a mortgagee is allowed to take advantage directly of the usual clause in a deed, whereby the grantee assumes the payment of the mortgage, is generally stated to be that as between the parties to the deed, the grantee thereby becomes the principal debtor for the mortgage debt, which has been allowed to him out of the purchase money, and the grantor is thenceforward merely a surety for the debt; and then, upon the familiar principle that the creditor is enabled by

¹ *Crawford v. Edwards*, 33 Mich. 354; *Trotter v. Hughes*, 12 N. Y. 78; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Finley v. Simpson*, 2 Zab. (N. J.) 311.

² *Hoff's Appeal*, 24 Pa. St. 200; *Lenig's Est.* 52 Pa. St. 138; *Crawford v. Edwards*, *supra*; *Blyer v. Monholland*, 2 Sandf. (N. Y.) Ch. 478; *Corbett v. Waterman*, 11 Iowa, 87; *Thompson v. Bertram*, 14 Iowa, 476; *Curtis v. Tyler*,

9 Paige (N. Y.), 435; *King v. Whitely*, 10 Ib. 465; *Balsey v. Reed*, 9 Ib. 451; *Burr v. Beers*, 24 N. Y. 178; *Converse v. Cook*, 8 Vt. 164.

³ *Vrooman v. Turner*, 8 Hun (N. Y.), 78; *Ballin v. Dillaye*, 37 N. Y. 35.

⁴ *Crawford v. Edwards*, 33 Mich. 354; *Comstock v. Smith*, 26 Mich. 306.

⁵ *Benedict v. Hunt*, 32 Iowa, 27.

way of equitable subrogation to all securities held by a surety of the principal debtor, the mortgagee is entitled to the benefit of this agreement made by the purchaser, although he did not know of its existence till long afterwards. In different forms this is in substance the doctrine of the cases.¹

The mortgagor having sold the property and taken such an agreement has become thereby a surety for the debt, and his creditor is entitled to the benefit of all collateral obligations he has taken for his indemnity.²

To support an action upon this ground, therefore, it is necessary in the first place that the grantor in whose favor the stipulation is made should himself be personally liable for the debt assumed by the grantee; and in the second place, that there be a debt or some obligation, on the part of the person assuming the payment of the mortgage, to support his undertaking.

Accordingly, if the grantor be not the mortgagor himself, or one who has bound himself personally for the payment of the mortgage debt, the grantee, in assuming the payment of the mortgage, does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him. There is in such case no chance for any equitable subrogation, and the agreement is considered as a mere declaration that the property was conveyed to the purchaser subject to the lien of the mortgage.³

756. A junior mortgagee not personally liable on his agreement to assume. — And accordingly, too, when such an agreement to assume the payment of a mortgage is contained in a mortgage, it does not as a general rule impose any personal liability upon the mortgagee for the payment of the prior mortgage debt, which can be enforced against him by the prior mortgagee.⁴ The subsequent mortgagee owes no money for the land, which he can promise to pay to the prior mortgagee, for he does not acquire title to the land. Where one "buys land absolutely for a stipulated price, and instead of paying the whole of it to his

¹ *Halsey v. Reed*, 9 Paige (N. Y.), 446; *Curtis v. Tyler*, 9 Ib. 432; *King v. Whitely*, 10 Ib. 465; *Marsh v. Pike*, 10 Ib. 597; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Russell v. Pistor*, 7 N. Y. 171; *Trotter v. Hughes*, 12 N. Y. 74.

² *Crawford v. Edwards*, 33 Mich. 354, per Mr. Justice Marston.

³ *King v. Whitely*, 10 Paige (N. Y.), 465, overruled in *Thorp v. Keokuk Coal Co.*, *infra*.

⁴ *Garnsey v. Rogers*, 47 N. Y. 233.

grantor, he is allowed to retain a part, which he agrees to pay to a creditor of a grantor having a lien upon the land, the amount which he thus agrees to pay is his own debt, which by arrangement with his grantor he has agreed to pay to the creditor of the latter, and, although this arrangement, not being assented to by the creditor, does not discharge the grantee from liability, yet, as between him and the party who has assumed it, the grantor is a mere surety. If the grantee pays it, he pays only what he agreed to pay for the land, and pays it in the manner agreed upon. And there is no hardship in allowing either the grantor or the mortgagee to enforce its payment. But in the case of a party having the land merely as security, such an undertaking is simply a promise to advance money to pay the debt of his grantor or mortgagor, which money when advanced the junior mortgagee can collect under his mortgage.”¹

757. When the assumption is made in an absolute deed, which is in fact a mortgage. — The fact that the assumption of the prior mortgage is made on a conveyance of the land absolute in form, but intended as a mortgage, does not change the rule.² The title of the grantee is defeasible. The grantor reserves the right to annul it by paying the debt, and when he does so, he discharges the agreement to pay the prior mortgage. “The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgage; for, if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its enuring to the benefit of any third party.”³

But a grantee was held liable to the mortgagee on his covenants to assume and pay the mortgage, where he had taken an absolute conveyance at the request of another and for his benefit, except so far as the profits of the land were to be security for a debt owed him by the person for whom he took the conveyance. The deed in this case was executed with the name of the grantee left blank. The purchaser, by agreement with one to whom he was indebted, inserted his debtor's name as grantee in the deed, with

¹ Mr. Justice Rapallo, in *Garnsey v. Rogers, supra*. ³ Per Rapallo, J., in *Garnsey v. Rogers, supra*.

² *Garnsey v. Rogers*, 47 N. Y. 233.

the understanding that the profits should be applied on account of the debt. In a suit against the grantee for a deficiency after a foreclosure of the mortgage, it was held the grantee was the absolute owner in fee of the premises; that the rights of the parties were to be determined by the facts existing when he consented to take the deed with a covenant to pay the mortgage, and that he was liable upon the covenants.¹

758. Doctrine that the mortgagee may maintain the action upon the ground of a promise for his benefit. — The later cases in New York, however, place the liability of the grantee in such case upon the broad doctrine, that when one person makes a promise to the benefit of a third person, the latter may maintain an action upon it.² It is not needful that any consideration should pass from such third person, or that he should know of it at the time. It is sufficient that the promise be made upon a sufficient consideration passing to the grantee, who assumes the mortgage from his grantor, and the mortgagee, in adopting the act of the latter for his benefit, is brought into privity with the promisor, and may enforce the promise, as if it were made directly to him.³

759. Under this rule the mortgagee need not resort to a foreclosure suit in the first instance, but may sue the grantee personally on his undertaking to pay the debt; and he may do this even when the mortgage bond provides that recourse shall first be had to the land, and then only to the obligor for the deficiency.⁴

In the case of *Thorp v. Keokuk Coal Co.*, the bonds accompanying the mortgage contained a condition that, in case of de-

¹ *Campbell v. Smith*, 8 Hun (N. Y.), 6; following *Lawrence v. Fox*, 20 N. Y. 268.

² *Burr v. Beers*, 24 N. Y. 178. This was an action at law upon the grantee's undertaking, without a foreclosure of the mortgage and without making the mortgagor a party. Mr. Justice Denio agrees that the previous cases proceed upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security, acquired by the mortgagor, which enures by an equitable subrogation to the benefit of the mortgagee; but since the case before the court was a suit at law,

and the doctrine of equitable subrogation could be invoked only in equity, it became necessary to determine whether the action could be maintained directly upon the grantee's promise in law; and it was decided that it could be.

³ *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Lawrence v. Fox*, 20 N. Y. 268. Followed by *Campbell v. Smith*, 8 Hun (N. Y.), 6.

⁴ *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; S. C. 47 Barb. 439; overruling *King v. Whitely*, 10 Paige, 465; S. C. Hoff. Ch. 477.

fault, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency.¹ The mortgage had not been foreclosed, and of course the obligors were not liable before foreclosure; but it was decided that the grantee, having made the agreement for a sufficient consideration passing from his grantor, was liable upon that to the mortgagee absolutely, and not upon the condition contained in the bonds that resort should first be had to the land by foreclosure of the mortgage. "It matters not," said Mr. Commissioner Earl, "that the mortgagor was not liable to pay personally until after foreclosure, and that he was then liable only for the deficiency. It would have made no difference if he had not been liable at all, the defendant having promised, upon a sufficient consideration, to pay the debt. This suit is not primarily upon the bond and mortgage, but upon the promise of the defendant to pay it; and this promise binds the defendant to pay the mortgage debt as it falls due, according to the terms of the bond and mortgage. It was not a conditional or contingent promise, and could not be discharged by payment only of a portion of the debt."

760. Under this rule it is not necessary that the grantor should be personally liable upon a mortgage which his grantee has assumed the payment of, in order to render the grantee liable upon his covenant to the holder of the mortgage assumed: thus, such a covenant made by one to whom the premises are conveyed, after several conveyances have intervened since the conveyance by the mortgagor, may be enforced by the holder of the mortgage, although the grantor in whose deed the payment was assumed had not assumed the payment of the mortgage debt, or made himself personally liable for it in any way.²

761. The promise must be express. — The doctrine estab-

¹ 48 N. Y. 253. The clause in the deed was: "This conveyance being made subject to a certain mortgage, &c., the payment of which said mortgage, &c., is hereby assumed by the party of the second part hereto."

² *Vrooman v. Turner*, 8 Hun (N. Y.), 78. Mr. Justice Dykman, referring to the case of *Trotter v. Hughes*, 12 N. Y. 74,

observed that the decision would have been more satisfactory had it been placed upon the ground that the defendant had not assumed the payment of the mortgage, and had not become liable to pay it in any way; but that whatever may be said about it, it cannot be considered authority since the case of *Burr v. Beers*, 24 N. Y. 178.

lished in New York that a promise by one person made to another for the benefit of a third may be enforced by the latter, although he was not privy to the transaction, must be limited, it would seem, to cases in which the promise is *expressly* stated to be for his benefit, or in which he has received money or property out of which to pay the obligation assumed: for it has been held by the Court of Appeals in that state that an agreement by one partner with another to pay the debts of the firm cannot be enforced by a firm creditor; because the agreement was not for their benefit, but to exonerate the partner from his liability.¹

762. This doctrine of the New York courts is not adopted elsewhere, but is criticised by other courts in its application to the subject of mortgages, or to any but simple contracts. Thus, in a recent case in New Jersey² the ordinary chancery doctrine, that

¹ *Merrill v. Green*, 55 N. Y. 270.

² *Crowell v. Currier*, 27 N. J. Eq. 152.

The same question was before the Supreme court in Massachusetts, in *Mellen v. Whipple*, 1 Gray, 317, where it was held that no action at law by the mortgagee lies upon the promise of a purchaser to assume and pay the mortgage. Mr. Justice Metcalf said: "The counsel for the plaintiff, in his brief puts the case upon this ground: 'On a promise not under seal, made by A. to B., for a good consideration, to pay B.'s debt to C., C. may sue A.'" Lord Holt, in *Yard v. Eland*, 1 Ld. Raym. 368, and Buller, J., in *Marchington v. Vernon*, 1 Bos. & Pul. 101, note, used nearly the same language; and it has been transferred into various text books, as if it were a general rule of law. But it is no more true, as a general rule, than another maxim, often found in the books, to wit, that a moral obligation is a sufficient consideration to support an express promise. Both maxims require great modification; because each expresses rather an exception to a general rule than the rule itself. . . . The general rule is and always has been that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue

on the contract. The rule is sometimes thus expressed: There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract." The learned judge then examines three classes of cases which are exceptions to this rule; but the case under consideration did not come in either class.

The same rule is recognized in the recent cases of *Pettee v. Peppard*, 120 Mass. 522; *Exchange Bank v. Rice*, 107 Mass. 37, 41.

It is a general principle that when one person, for a valuable consideration, engages with another by *simple contract* to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. It does not rest upon the ground of any actual or supposed relationship between the parties, or upon any implied agency, but upon the broad basis that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded. Per Bigelow, J., in *Brewer v. Dyer*, 7 Cush. (Mass.) 337; and see *Carnegie v. Morrison*, 2 Met. (Mass.) 381, per Shaw, C. J., and cases cited there.

the covenant of a purchaser who assumes the payment of an existing mortgage is a collateral security obtained by the mortgagor, which cures by way of equitable subrogation to the benefit of the mortgagee, is asserted. It is declared that the mortgagee's right does not rest on the theory of a contract between him and the purchaser; that no action at law can be maintained to assert this right; but that the remedy is purely equitable.¹ Referring to the case of *Burr v. Beers*,² where it was held that a mortgagee may maintain an action at law, before foreclosure, on such covenant, upon the broad principle that a promise by one person to another, for the benefit of a third, may be enforced directly by the latter, Vice-Chancellor Van Fleet said: "This principle, in its application to simple contracts, has given rise to a great contrariety of judicial opinion. So far as it applies to simple contracts, it must be regarded as settled, in this state, for the present.³ But it has never been understood to apply to contracts under seal. And *Burr v. Beers* is, so far as I know, the first attempt in that direction. The rule that an action at law for breach of a contract under seal can only be brought in the name of a party to the instrument, and that a third person, who is not a party to it, cannot sue on it, though it appears to have been made expressly for his advantage, is so ancient, and has been so generally adhered to, that it must be regarded as axiomatic, and beyond the power of the courts to alter or destroy.⁴ The legal nature of contracts of assumption, when expressed in deeds, is no longer open to dispute in this state. They have been declared to be valid covenants, for breach of which an action of covenant may be maintained.⁵ So completely is the assumption of the purchaser regarded as a contract with the grantor alone, that unless the grantor is personally liable for the mortgage debt, the promise of the purchaser is held to be a *nudum pactum*, and of course without efficacy in favor of either grantor or mortgagee.⁶ It would seem to be clear, then, that in ordinary cases the mortgagee does not, by force of the contract, acquire a right of action against the purchaser, but the benefit flowing to him from the contract is limited to a right to

¹ *Klapworth v. Dressler*, 2 Beas. (N. J.) 62.

² 24 N. Y. 178.

³ *Joslin v. N. J. Car Spring Co.* 7 Vroom (N. J.), 146.

⁴ 1 Chitty on Contr. (11th Am. ed.) 77;

Johnson v. Foster, 12 Met. 167; *Mellen v. Whipple*, 1 Gray, 317; *Millard v. Baldwin*, 3 Gray, 486.

⁵ *Finley v. Simpson*, 2 Zab. (N. J.) 311.

⁶ *King v. Whitely*, 10 Paige, 465;

Trotter v. Hughes, 12 N. Y. 74.

be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate, to the satisfaction of his mortgage, any security held by his debtor, for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment. His right is simply the right of substitution, permitting a new creditor to take the place of an old one, and allowing the new to succeed to the rights of the old one. The adoption of the other view would lead to the establishment of this anomalous and unjust principle, that a person shall have a right of action on a contract to which he is not a party, but a stranger, which was not made for his benefit, for which he gave no consideration, and which never influenced his conduct in the slightest degree."

763. Whether the grantor can deprive the mortgagee of the benefit of a covenant made by the grantee who has assumed the payment of the mortgage does not seem to be decisively settled. On the one hand, in *Garnsey v. Rogers*,¹ in which case the Court of Appeals of New York distinguished between a covenant by a grantee in an absolute deed to assume a mortgage, and one made by a subsequent mortgagee to assume a prior mortgage, holding that the latter does not thereby make himself personally liable for such debt to the prior mortgagee, Mr. Justice Rapallo, in stating the grounds of this distinction, said: "It must be considered that, where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor cannot retract his conveyance, or the grantee his promise or undertaking; but, where contained in a mortgage, the conveyance is defeasible. The grantor reserves the right to annul it by paying his debt, and when he does so, he discharges the agreement to pay the prior mortgage. The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its enuring to the benefit of any third party."²

¹ 47 N. Y. 233, 242.

² See, also, a dictum to same effect in *Hartley v. Harrison*, 24 N. Y. 170.

This doctrine is supported by the decision in *Simson v. Brown*,¹ in the Supreme Court of New York. That was an action upon a bond given to a mortgagor conditioned to pay to the holder of a mortgage the full amount of it, and to save the mortgagor harmless therefrom, and the payment was guaranteed by another person. The mortgagor was not personally liable for the payment of the mortgage debt, although the principal in the bond was so liable to the holder of the mortgage. The mortgagor who took the bond afterwards executed and delivered to the principal obligor in the bond a satisfaction of the bond, which, however, he did not deliver up or cancel, but afterwards assigned to the holder of the mortgage. In a suit by the latter against the guarantor of the bond, it was held that he was entitled to recover; that the mortgagor did not by his release discharge the bond as against the holder of the mortgage.

It may be remarked of this case, that the bond was in form an obligation to pay the debt to the holder of the mortgage, and to indemnify the mortgagor as well. The mortgagor not being liable for the debt, his release did not harm him, and was a satisfaction of his interest in the obligation; but the principal obligor was directly responsible to the holder of the mortgage aside from the bond, and the bond was to pay the debt. The holder of the mortgage was interested in compelling payment of the bond, and not having himself released the parties bound by it, he had a right to maintain his action unimpaired by the act of the mortgagor.

764. When the grantor may release the grantee.—In a later case, however, before the same court, it appeared that the grantee, who in a deed from the mortgagor had assumed the mortgage, had entered under his deed, and made payments upon the mortgaged land, but that he afterwards conveyed the premises to a brother of the mortgagor in consideration of receiving a release under seal, executed by the latter, from all liability on the bond and mortgage, and from all obligation assumed by him in the purchase of the premises, the mortgagor agreeing to pay any deficiency which might arise upon foreclosure. In a suit by the mortgagee against the grantee to compel payment of the debt, on the ground of his contract or covenant to pay it, it

¹ 6 Hun (N. Y.), 251.

was held that the release operated to discharge the grantee from all obligations assumed by him under the deed.¹

It would seem that unless the holder of the mortgage purchased it, relying upon the covenant as part of his security, or has since been influenced by it in his dealing with the mortgage, and has no equity except that flowing through the mortgagor, but simply the rights of the mortgagor, he has no rights at all against the purchaser after the mortgagor has voluntarily released him from all liability under his covenant.

765. Conveyance on condition that the grantee pay a mortgage. — A conveyance "subject to" certain mortgages, "to be assumed and paid by the grantee, his heirs and assigns, the same making part of the consideration," and "on condition" that the grantor and his representatives shall be forever indemnified and saved harmless from the payment of them, is a grant on condition, and forfeited by a breach thereof, and not in the nature of a mortgage from the grantee to the grantor, with a right of redemption for three years after such breach. Such condition is not extinguished by the grantor's taking back a mortgage for a part of the consideration subject to the mortgages assumed, with covenants to save the grantor harmless against them, and his entry upon the land for breach of the condition of the deed is not affected by an assignment of the mortgage before or after such entry.² But any entry in such case made for the purpose of foreclosure will not serve as an entry for foreclosure under the condition in the deed until some further notice be given or act done for that purpose.³

In such case if the grantee fail to perform the condition, the grantor is not confined to a forfeiture as his only remedy, but he may maintain an action against the grantee upon his implied promise to pay the mortgage, and recover any payments he has made. The grantor may enter for breach of the condition, but he may have an action upon the promise as well.⁴

766. Grantor's agreement to discharge a mortgage. —

¹ *Stephens v. Casbacker*, 8 Hun (N. Y.), 116.

³ *Stone v. Ellis*, 9 Cush. (Mass.) 95.

⁴ *Pike v. Brown*, 7 Cush. (Mass.) 133.

² *Hancock v. Carlton*, 6 Gray (Mass.), 39.

Where a grantor of land, subject to a second mortgage, gives the purchaser a bond conditioned to save him harmless from it, and to cause it to be assigned to him within six months, a failure to do this entitles the purchaser, even after the foreclosure of the first mortgage, to recover damages to the amount of the difference between the value of the estate and the amount due on the first mortgage, if the value of the property is less than the amount of the two mortgages.¹

The general covenants in a grantor's deed bind him to discharge an existing mortgage, unless there be some provision to the contrary. In equity this covenant may be released without a technical release, by matters *in pais*; as for instance by a subsequent transaction between the parties in which the purchaser agrees to assume and pay this mortgage.²

767. When a purchaser is entitled to a release.—A purchaser of a portion of the premises covered by a mortgage duly recorded is not entitled to a release of that portion by reason that he has given to the mortgagor his promissory note for the whole value of that portion, and the mortgagor has transferred the note to the mortgage creditor to be applied in reduction of the mortgage debt. Neither does the payment of such note give him this right, unless the holder of the mortgage has agreed to release.³ The mortgage covers the whole property, and secures the whole debt; and the holder of it, aside from any agreement, is under no obligation to release any part of the property upon payment of a part of the debt.

768. The remedy of the grantor.—If a purchaser who has assumed a mortgage debt omit to pay it when due, the seller may take an assignment of the mortgage to himself, and foreclose the same, or sue on the agreement and recover the amount paid by him in obtaining the mortgage, not exceeding the amount unpaid on such mortgage. In such an action, written receipts indorsed on the mortgage by the mortgagee are competent evidence to show payments thereon. The plaintiff in such action can only recover the amount paid by him.⁴

¹ Coombs v. Jenkins, 16 Gray (Mass.), 153.

³ Colby v. Cato, 47 Ala. 247.

² Drury v. Tremont Improvement Co. 374.
13 Allen (Mass.), 168.

⁴ Mills v. Watson, 1 Sweeny (N. Y.),

After the premises have been sold to one who has agreed to pay off the mortgage, the mortgagor may himself purchase the mortgage and foreclose it.¹

And so a mortgagor, who has sold subject to the mortgage debt, upon being compelled to pay it, is subrogated to the benefit of the security, without any formal assignment of it to him. He thereby becomes an equitable assignee of it and may enforce it against the property.²

The purchaser, by assuming the payment of the mortgage, makes himself personally liable both to the mortgagee and to the mortgagor. Upon a default the mortgagor may immediately, before paying the mortgage, proceed against him upon his covenant.³ He cannot compel the mortgagee to foreclose his mortgage so as to subject the land to the payment of the debt, and the purchaser to a judgment for the deficiency; but he may himself proceed in equity to compel the purchaser to pay off the mortgage according to his undertaking.⁴

Under codes of practice allowing an equitable suit in such case, the grantor may maintain a bill to have the mortgage satisfied out of the land.⁵

769. A contract to pay a mortgage may be enforced before the promisee has paid it. — A provision whereby a grantee “assumes and agrees to pay” a mortgage is a contract not merely to indemnify the grantor, but to pay the debt provided it be the debt of the grantor. It is not necessary, therefore, as it is in case of an agreement purely to indemnify the grantor against any loss or damage by reason of the mortgage,⁶ that the grantor should show that he has been in some measure damnified before he can recover on such promise.⁷ “There is no reason,” says Mr. Justice Devens, in a recent case before the Supreme Court of Massachusetts, “why an agreement may not be made which shall bind the party so contracting to pay the debt which

¹ *Mills v. Watson*, 1 Sweeny (N. Y.), 374.

² *Kinnear v. Lowell*, 34 Me. 299; *Baker v. Terrell*, 8 Minn. 195.

³ *Rubens v. Prindle*, 44 Barb. (N. Y.), 336; *Bowen v. Kurtz*, 37 Iowa, 239.

⁴ *Marsh v. Pike*, 1 Sandf. (N. Y.) Ch. 210; *S. C.* 10 Paige, 595; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16.

⁵ *Abell v. Coons*, 7 Cal. 105.

⁶ *Little v. Little*, 13 Pick. (Mass.) 426.

⁷ *Furnas v. Durgin*, 119 Mass. 500. See *Brewer v. Worthington*, 10 Allen (Mass.), 329. *Contra*, see *Burbank v. Gould*, 15 Me. 118.

another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him to do so. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed to pay. It is a portion of the consideration money due the plaintiff, which he was to receive by payment of a debt for which he was liable, which he thus recovers, when the defendant fails to perform his promise. That the plaintiff should be kept subject to a debt from which the defendant agreed to relieve him is a continuing injury, for which a sum of money, which will enable him to discharge it, is an appropriate remedy in damages."¹

Such a promise, moreover, when no time is specified for the payment of the mortgage, is a promise to pay it when it becomes due, or if it be already due to pay it forthwith.²

770. The measure of damages in an action by the grantor against his grantee upon his promise to pay a mortgage debt is the amount of the debt and interest remaining due. If the defendant should pay the debt at any time before final judgment, the damages to be recovered would be nominal only. Such payment would obviate the risk that otherwise may be incurred, that the plaintiff may not devote the sum recovered by him to the payment of the mortgage debt, and that the defendant, in order to relieve his property, may be compelled to pay the amount a second time. "There is no mode at law," says Mr. Justice Devens,³ "by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract. Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded that would secure the party paying under such circumstances from having the payment made by him devoted to any other ob-

¹ *Furnas v. Durgin, supra*. See authorities there cited in support of the proposition that a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action

may be maintained and damages recovered to the amount of such debt.

² *Furnas v. Durgin, supra*.

³ See *Furnas v. Durgin*, 119 Mass. 500, 508.

ject than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt which the defendant has agreed to extinguish."

CHAPTER XVIII.

A LESSEE'S RIGHTS AND LIABILITIES.

771. The mortgagor while in possession is entitled to the rents. — So long as the mortgagor is allowed to remain in possession without an actual entry by the mortgagee, although there has been a breach of the condition of the mortgage, he is entitled to receive the rents and profits to his own use, and is not liable to account for them to the mortgagor.¹ If the premises are under lease, the right of the mortgagor in possession to the rents is the same, whether the lease was made before or after the mortgage; he may lawfully receive the rents until the mortgagee interferes; and he receives them to his own absolute use, and not for the use of the mortgagee.²

In those states in which the mortgagee is prohibited from taking possession previous to foreclosure, the mortgagor may make a valid and binding assignment of the rents and profits until foreclosure and sale. Such an assignment does not operate as a fraud upon the mortgagee, because he is not in any event entitled to the rents and profits before such time. The assignee of the rents and profits may enforce his right to them by an action in the nature of a foreclosure suit.³ In the absence of a specific pledge of the rents and profits to the mortgagee as part of his security, the mortgagor, though insolvent, may, until the foreclosure sale, or until the appointment of a receiver pending the foreclosure suit, receive them to his own use or assign them to another.⁴ The foreclosure sale alone does not divest the mortgagor of his right of

¹ *Fitchburg Manuf. Cor. v. Melven*, 15 Mass. 268; *Gibson v. Farley*, 16 Mass. 280; *Boston Bank v. Reed*, 8 Pick. (Mass.) 459; *Wilder v. Houghton*, 1 Ib. 89; *Mayo v. Fletcher*, 14 Ib. 525; *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Clarke v. Curtis*, 1 Gratt. (Va.) 289.

² *Trent v. Hunt*, 9 Exch. 14, 22, per Alderson, B. See § 670.

³ *Dewey v. Latson*, 6 Cal. 609.

⁴ *Syracuse, &c. Bank v. Tallman*, 31 Barb. (N. Y.) 201. See § 669.

possession; he may occupy the premises or receive the rents of them until the delivery of the deed to the purchaser. A lessee having purchased at the foreclosure sale, and a delay of several weeks having occurred in the delivery of the deed to him, during which a quarter's rent became due under the lease, he was held liable in an action by the mortgagor for such rent. Although he made a tender of the purchase money soon after the sale, it was held that his tender did not operate to vest in him the legal title; nor did the subsequent delivery of the deed to him operate by relation to vest the title in him at the time of the purchase, or of the tender of the purchase money. He should have followed up his tender by a motion to pay the money into court, or to compel the completion of the sale, whereupon the court could have adjusted the equities of all the parties, and made the loss arising from the delay fall upon the party whose negligence caused it. The court might have ordered the tenant to attorn to the purchaser, and the interest on the mortgage to cease from the day of tender.¹

772. A mortgagee has no specific lien upon the rents and profits of the mortgaged land unless, he has in the mortgage stipulated for a specific pledge of them as part of his security. He has no claim upon them until he has the right to take possession of the premises under his mortgage. Until the mortgage debt is due he is not entitled to have a receiver of such rents appointed.² The tenant may safely continue to pay rent to the mortgagor, until he receives notice from the mortgagee of his requirement that the rents be paid to him.

Where a mortgagee has taken a lease of the mortgaged premises from the mortgagor, upon a subsequent sale of the equity of redemption, he cannot apply the rents as against the purchaser in set-off upon the mortgage debt.³

773. A lease already existing at the date of the mortgage is in no way invalidated by the giving of the mortgage. It is then a paramount interest, and the mortgage is subject to it. The mortgagee has only the rights of the mortgagor as against the lessee.⁴

¹ *Clason v. Corley*, 5 Sandf. (N. Y.) 447.

³ *Scott v. Fritz*, 51 Pa. St. 418.

² *Bank of Ogdensburgh v. Arnold*, 5 Paige (N. Y.), 38.

⁴ *Hemphill v. Giles*, 66 N. C. 512.

The mortgagor may of course, at the time of making a mortgage of the reversion, release the tenant from the payment of the rents accrued at that time; but otherwise the rent then accruing goes with the reversion, and the mortgagee is entitled to it if he gives the tenant notice before the rent day.¹

But a payment of rents in advance is not binding upon a mortgagee of the reversion. "The question is," says Mr. Justice Willes,² "whether, where there has been an assignment of a reversion, payment of rent to the assignor before rent day takes away the rights of the assignee to the rent so completely, that if he should give notice before rent day of the assignment, the payment would still be good. There would be an obvious injustice in that, even if the payment were made before the assignment, because a person who bought the reversion on the faith that the rent was becoming due would be defeated by a transaction between the landlord and tenant, of which he had no notice."

774. A mortgage of premises already leased is an assignment of the reversion. — It is a clearly established rule that a mortgagee upon giving notice to a tenant of the mortgaged premises, under a lease for years given prior to the mortgage, is entitled to all rent accruing and becoming due subsequent to the execution of the mortgage, as well that in arrear at the time of giving notice, as that which accrues afterwards.

This was decided in the time of Lord Mansfield, and has been a recognized principle ever since.³ The mortgagee becomes entitled to the rent without any attornment by the tenant. The mere execution of the mortgage subsequent to the lease operates as an assignment of the reversion, and carries the rent as incident to it, and the mortgagee is entitled upon notice to the tenant to receive the rents whenever he is entitled to possession. No actual entry by him is necessary.

Rent accrued prior to the mortgage does not pass as incident to

¹ *De Nicholls v. Saunders*, L. R. 5 C. P. 589. *Smith's Lead. Cas.* 310; *Newall v. Wright*, 3 Mass. 138; *Fitchburg Cotton Manuf. Co.*

² *De Nicholls v. Saunders*, L. R. 5 C. P. 589; and see *Cook v. Guerra*, 7 Ib. 132. *v. Melven*, 15 Mass. 268; *Burden v. Thayer*, 3 Met. (Mass.) 79; *Russell v. Allen*, 2 Allen (Mass.), 42; *Mirick v. Hop-*

³ *Rogers v. Humphreys*, 4 Ad. & E. 299; *Trent v. Hunt*, 9 Exch. 14; *Moss v. pin*, 118 Mass. 582; *Kimball v. Smith*, 6 R. I. 138.

the reversion, but is a mere chose in action belonging to the mortgagor. But rent accruing and becoming due after the execution of the mortgage does pass as incident to the reversion, and may be recovered of the lessee after notice of the mortgage, and without an actual entry by the mortgagee upon the premises. His right does not extend to rents already due when the mortgage was executed, or to rents which have been paid to the mortgagor before notice to the lessee of the mortgage.¹

The mortgagee as assignee of the reversion has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had, so long as the term continues, and the tenant acknowledges his title.²

775. To entitle the mortgagee to the rents as against the mortgagor, it is not necessary that his entry should be effectual for the purpose of foreclosure, but any possession taken by him with notice to the tenants to pay the rent to him is sufficient.³ The mortgagor cannot recover for rents that accrue afterwards. To an action by him on the covenants of the lease, the entry of the mortgagee and the promise of the lessee to pay to him are a good defence.

Where the mortgagor has appointed an agent to receive the rents of the mortgaged estate, a notice to him by the mortgagee to pay the rents when collected to himself is a termination of the mortgagor's tenancy at will, and the agent will hold the rents subsequently accruing as trustee of the mortgagee.⁴

776. Lease by mortgagor after the mortgage. — A mortgagor cannot make a lease of the mortgaged premises which will be binding upon the mortgagee.⁵ Upon a breach of the condition the mortgagee may enter, and treat the lessee as a trespasser and without notice bring ejectment.⁶ If the mortgagee after entry accepts rent from such lessee, the relation of landlord and tenant is thereby created, but this tenancy will be deemed one from year

¹ *Russell v. Allen*, 2 Allen (Mass.), 42; *Mirick v. Hoppin*, 118 Mass. 582.

² *Rogers v. Humphreys*, 4 Ad. & El. 299, 313, per Lord Denman, C. J.

³ *Stone v. Patterson*, 19 Pick. (Mass.) 476; *Welch v. Adams*, 1 Met. (Mass.) 494.

⁴ *Crosby v. Harlow*, 21 Me. 499.

⁵ *McDermott v. Burke*, 16 Cal. 580.

⁶ *Weaver v. Belcher*, 3 East, 449; *Rogers v. Humphreys*, 4 Ad. & El. 299, per Lord Denman.

to year, and not for the term of the original lease.¹ The mortgagee can no longer treat the lessee as a trespasser.²

Whether the tenant has actual notice of the mortgage or not makes no difference if the mortgage be recorded; it is then constructive notice, and affects one who becomes the tenant of the mortgagor as much as it affects a purchaser. The mortgagor has no implied power to bind the mortgagee by lease.³

A mortgagor's lease is, however, good as between the parties, by virtue of the contract, and upon a subsequent discharge of the mortgage the defect in the lessee's title is removed. But the tenant cannot compel the mortgagor to pay off the mortgage in order that his lease may be perfected; but he is left to his remedy at law for damages.⁴ It is avoided only upon the interference of the mortgagee, and until that time the mortgagor is entitled to receive the rent to his own use, and to enforce the payment of it by action in his own name.⁵

777. Attornment by lessee under lease made after the mortgage.—The rights and liabilities of the parties are very different when a mortgagor in possession makes a lease for years subsequent to the execution of the mortgage. There is then no privity of contract between the mortgagee and lessee, and until actual entry by the mortgagee, or the lessee expressly promises to pay rent to him, he can maintain no action against the lessee to recover it.⁶ He cannot by mere notice compel the tenant to pay rent to him, and his title to rent does not accrue until he has obtained possession of the mortgaged estate; but if the tenants of the mortgagor pay rent to the mortgagee, they thereby by attornment become his tenants, and entitle him from that time to receive the rents.⁷

The mortgagee may treat a lessee holding under a lease from the mortgagor since the mortgage as a trespasser, and eject him; but unless the tenant has attorned to him, he cannot distrain or

¹ *Hughes v. Bucknell*, 8 Car. & P. 566.

² *Birch v. Wright*, 1 T. R. 378.

³ *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

⁴ *Costigan v. Hastler*, 2 Sch. & Lef. 160; see *Howe v. Hunt*, 31 Beav. 420; *Carpenter v. Parker*, 3 C. B. N. S. 206.

⁵ *Trent v. Hunt*, 9 Exch. 14, 22, per Alderson, B.

⁶ *Morse v. Goddard*, 13 Met. (Mass.) 177; *Field v. Swan*, 10 Ib. 112; *Mass. Hosp. Life Ins. Co. v. Wilson*, 10 Ib. 126.

⁷ *Kimball v. Smith*, 6 R. I. 138.

bring an action for rent, as there is no relation of landlord and tenant between them.¹ A mere notice by the mortgagee to the tenant to pay the rent to him, to which the tenant does not consent, or upon which he does not act, does not make the tenant liable to him in an action for rent, nor does a request by the mortgagor that he will pay to the mortgagee have this effect.²

If the tenants under such a lease attorn to the mortgagee after a breach of the condition which gives him the right of entry, they thereby become his tenants and debar the mortgagor from recovering from them.³ The mortgagee, as between him and the mortgagor, has then the right to enter and take possession of the premises; and if the tenant yields up possession to the mortgagee, he does voluntarily what the law will compel him to do. By attornment he does not injure the mortgagor, and he saves himself the costs of an eviction by the mortgagee. His attornment is a good defence to an action by the mortgagor for the rent.⁴

It is no answer to a claim for rent by a second mortgagee who has entered that there is a prior mortgage, under which no entry has been made.⁵

778. But in a state where a mortgage is regarded as conveying no title to the mortgagee, and the right of possession until foreclosure and sale is assured to the mortgagor by statute, it has been held that there is nothing to rest an attornment upon, and that this doctrine has no application. The verbal agreement of the tenant to pay rent to the mortgagee does not continue the existing tenancy, simply putting the mortgagee

¹ *Rogers v. Humphreys*, 4 Ad. & El. 299, 313, per Lord Denman, C. J.

² *Evaus v. Elliott*, 9 A. & E. 342.

In ALABAMA it is provided that every conveyance of an estate is good and effectual without attornment of the tenant; but that no tenant is liable who has paid his rent without notice of such conveyance. Code, 1867, § 1568.

The mortgagee is entitled to the rents upon giving notice to the tenant. *Marx v. Marx*, 51 Ala. 222; *Knox v. Easton*, 38 Ala. 345; *Hutchinson v. Dearing*, 20 Ala. 798; *Mansony v. U. S. Bank*, 4 Ala.

735; *Coker v. Pearsall*, 6 Ala. 542; *Branch Bank v. Fry*, 23 Ala. 770

³ *Kimball v. Lockwood*, 6 R. I. 138; *Hemphill v. Giles*, 66 N. C. 512; and see *Higginbotham v. Barton*, 11 Ad. & El. 307, 315.

⁴ *Smith v. Shepard*, 15 Pick. (Mass.) 147; *Magill v. Hinsdale*, 6 Conn. 464; *Jones v. Clark*, 20 Johns. (N. Y.) 51; *Jackson v. De Lancey*, 11 Ib. 365; see *Souder v. Vansickle*, 8 N. J. L. (3 Halst.) 315.

⁵ *Cavis v. McClary*, 5 N. H. 529.

in place of the mortgagor as landlord ; but it is a new undertaking and must be valid as a new agreement if valid at all. This was the view taken by Mr. Justice Christiancy of Michigan in a recent case :¹ “ If it be said that, though the mortgage does not give the mortgagee the right to possession against the will of the mortgagor, yet, by the consent of the mortgagor and the tenant, he may be let into possession, and thus acquire the right to rent ; so, I reply, may any other person not holding a mortgage acquire in the same way the right to possession and the right to rent, by any valid agreement to that effect. But, in both cases alike, I think it would depend upon the contract *as such*, which might be made between them, and not upon the doctrine of attornment.”

779. Tenants cannot be allowed compensation for improvements, although they have taken leases for a term of years, with a certain rent, and have made advancements of money to the mortgagor under an agreement that he should expend it in buildings and improvements, and he so spends it.²

If the mortgagor, or his tenants, or others claiming under him, make improvements, they can avail themselves of their improvements by paying the mortgage debt.

If, during the pendency of an action to foreclose a mortgage, the mortgagor makes leases under which the lessees enter and retain actual possession under claim of right, the mortgagee, after recovering judgment for possession against them, is entitled to recover damages for rents and profits from the time when the formal possession was delivered to him ; and not merely for the rents and profits of the land, but also for the rents and profits of buildings erected and improvements made on the premises by the tenants, although they had reason to believe that their title under the lease was valid.³

780. Emblements. — A mortgagor is subject to ejectment without notice whenever the mortgagee has the right to enter, and is not entitled to the growing crops.⁴ His tenant has no greater rights. The mortgagee may treat him as a trespasser ; he may enter immediately and take the emblements.

¹ *Hogsett v. Ellis*, 17 Mich. 351.

³ *Haven v. Adams*, 4 Allen (Mass.),

² *Haven v. Boston & Worcester R. R.* 80.

Co. 8 Allen (Mass.), 369.

⁴ See §§ 697, 776.

By foreclosure and sale, the purchaser of the premises becomes entitled to the possession of them, and to all the crops then growing on them; and a lessee holding the property under a lease from the mortgagor made subsequently to the mortgage, without the concurrence of the mortgagee, has no greater right than the mortgagor to the emblements.¹ Under such a lease the lessee holds subject to all the rights of the mortgagee, unimpaired and unaffected; and is liable to trespass for taking and carrying away the crops growing at the time of the sale.

781. No one but the mortgagee can take advantage of the invalidity of a lease as to him.—It has been held, however, that although a lease made by a mortgagor after the execution of the mortgage is not binding upon the mortgagee, and the lessee holds subject to the rights of the mortgagee, yet if the mortgagee does not object to the lease as interfering with his rights or as impairing the security the mortgage was intended to give, or that there has been any forfeiture of the conditions, a stranger should not be permitted to volunteer such objections, which are strictly technical, in order to avoid liability for an unauthorized trespass. This was the determination of the Supreme Court of Missouri in a case where the lessee under such a lease brought suit for trespass upon the leased premises by carrying away a large amount of lead ore. The defendant was not allowed to set up the invalidity of the lease as against the mortgagee.²

782. Provision authorizing the mortgagor to bind the mortgagee by leases.—Doubtless a provision may be made in a mortgage, which would enable the mortgagor while remaining in possession to give leases of the premises which would be binding upon the mortgagee or any one claiming under him after a breach of the condition of the mortgage, and possession taken by him under it. But when the circumstances are such that the power reserved by the mortgagor to make leases is repugnant to the purposes of the mortgage, the exercise of it will not avail to make the leases valid beyond the time of a breach of the condition.

¹ See § 697; *Lane v. King*, 8 Wend. (N. Y.) 584; *Downard v. Groff*, 40 Iowa, 597.

² *Kennett v. Plummer*, 28 Mo. 142.

Such was held to be the case where a railroad company executed a mortgage to trustees to secure bonds of the form annexed thereto, which contained a certificate that it was secured by a mortgage of real estate, and the mortgage contained a provision authorizing the trustees upon a breach of the condition, at the request of the bondholder, to take possession of the premises, or under certain circumstances to sell them at public auction; and the mortgage further provided, that until breach of the condition the mortgagor should remain in undisturbed possession and occupation, "and that nothing herein contained shall be so construed as to prevent said corporation from improving said real estate, or making leases of such parts thereof as they may desire and have opportunity to make."¹ Leases were made by the corporation for a long term of years, and the rent was partly paid in advance, and the mortgagees having subsequently foreclosed the mortgage, the tenants claimed that the leases were valid by virtue of this clause. In construing this provision in its application to the leases, and in determining whether they were within the right reserved, the court advert to the purpose for which the mortgage was made, saying that it was not made to secure the mortgagees their private claims but debts due to bondholders, that the bonds were made to be sold in the market and were transferable by delivery. The leases provided for the application of the rents to the payment for improvements, and to the payment of interest on bonds of the corporation held by the lessees in a way to create a preference over the bondholders generally. "If the right to create such a preference," say the court, "had been so clearly expressed in the mortgage, and stated in the certificate on the bonds, as that all parties understood it, the bonds must have been regarded as unsound, and would have had little or no market value. And if the parties to the mortgage intended that such a right should be reserved, the certificate must be regarded as fraudulent, and as designed to give the bonds a fictitious credit. It is impossible to state a stronger case of repugnance to the object of a grant." It was therefore decided that the validity of the leases terminated upon breach of the condition of the mortgage, and that the trustees could not, by an oral assent, confirm them so as to give them validity for a longer time.

¹ *Haven v. Adams*, 4 Allen (Mass.), 80.

783. A lease made by the mortgagee in possession is necessarily terminated by a redemption of the mortgage, unless there has been some express or implied authority from the mortgagor to lease for a given time.¹ But it has been held that if all the parties are before a court of chancery, the court will not direct the delivery of possession at a time that would work great hardship to the lessee.² Ordinarily, however, the mortgagor may upon redemption treat the mortgagee's tenant as a trespasser and recover possession without notice, just as a mortgagee may upon entry treat the mortgagor's lessee. The only safety for a lessee in taking a lease of premises subject to a mortgage is to obtain the concurrent action of the mortgagor and mortgagee in the execution of the lease.

784. An assignment by a mortgagee in possession does not transfer any rent due at the time of the assignment without express words to that effect; nor does it pass any right of action the mortgagee had for any appropriation of the products of the land by the mortgagor or any other person.³ In *Salmon v. Dean*,⁴ Lord Chancellor Truro upon this question said: "One would think that this was a very ordinary matter: men are in the daily habit of conveying estates, and if the by-gone rents in arrear do not pass by a conveyance of the fee, what is the rule of law that makes a difference in the case of a mortgage?" In conclusion, he added: "I am unable to understand, having listened attentively to the argument, upon what principle of law or equity the assignee of a mortgage can claim the rent due before the assignment to him, he not pretending that the assignment contains any words of transfer beyond those incidental to the transfer of the mere mortgage."

785. When the mortgagee of a leasehold estate liable for the rent. — A mortgage of a leasehold estate, being in law an assignment of the lease, makes the mortgagee liable upon the covenants of the lease for the payment of rent, from the time of the mortgage, as this covenant in the lease runs with the land, and binds

¹ *Hungerford v. Clay*, 9 Mod. 1; *Wilmington v. Harvey*, 5 N. H. 252.

² *Holt v. Rees*, 46 Ill. 181; S. C. 44 Ill. 30.

³ *Salmon v. Dean*, 3 Mac. & G. 344; *Kimball v. Lewiston Steam Mill Co.* 55 Me. 494.

⁴ *Supra*.

the party holding the legal estate. It makes no difference whether the mortgagee be in possession or not; if he is assignee of the entire term he is liable on the real covenants of the lease.¹ But where, as in New York, a mortgage is considered as a mere lien, a mortgagee not in possession is not considered as an assignee of the entire term, and therefore it is held that he is not liable for rent until he takes possession.²

Where the registry laws of a state require the recording of mortgage or the assignment of it to make it valid, if not recorded it is ineffectual to pass the legal estate, and liability upon these covenants is not incurred by the person taking such unrecorded instrument.³

In making a mortgage of a leasehold estate it is often preferable for the mortgagee to take a lease of the property for a period short of the whole term, rather than a formal mortgage of the leasehold estate which amounts to an assignment of the whole term, and makes the mortgagee liable upon the covenants of the lease, although he does not enter into possession of the property. A lease or an assignment of the rents for a period short of the whole term subjects him to no such liability; but on the other hand, it is not so complete a security, especially as it leaves the mortgagor in a position to forfeit and defeat the estate. Therefore in taking security upon a leasehold estate, the mode of effecting it is a matter to be determined according to the circumstances of the case.

If a lessee assign his estate by way of mortgage, the assignee is liable on the covenants of the lease to pay rent, although he does not actually enter and take possession under the mortgage; but he is only liable for the rent which accrues after the taking of the mortgage. The covenants of the lease running with the land, it is regarded as a necessary consequence that the mortgagee, by becoming vested of the whole legal estate, is liable for the performance of the covenants.⁴

¹ *Williams v. Bosanquet*, 1 Brod. & B. 238, overruling *Eaton v. Jaques*, 2 Doug. 456, where Lord Mansfield held that a mortgagee out of possession was not liable. See *Lester v. Hardesty*, 29 Md. 50; *Mayhew v. Hardesty*, 8 Md. 479; *Pingrey v. Watkins*, 15 Vt. 479; *Farmers' Bank v. Mut. Assurance So.* 4 Leigh (Va.), 69.

² *Walton v. Cronly*, 14 Wend. (N. Y.) 63; *Astor v. Miller*, 2 Paige (N. Y.), 68; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Childs v. Clark*, 3 Barb. (N. Y.) Ch. 52.

³ *Lester v. Hardesty*, 29 Md. 50.

⁴ *M'Murphy v. Minot*, 4 N. H. 251.

The mortgagee of a leasehold estate is entitled, in the absence of any stipulation to the contrary, to all rents that subsequently become due, and may maintain an action against the tenants to recover them: but he has no right to the rents that were due at the time of the grant to him of the reversion.¹

The mortgagee is entitled to the benefit of any covenants contained in the lease for a renewal of it, and his lien attaches to the renewed lease.²

¹ *Burden v. Thayer*, 3 Met. (Mass.) 76. ² *Slee v. Manhattan Co.* 1 Paige (N. Y.), 48.

CHAPTER XIX.

ASSIGNMENT OF MORTGAGES.

1. *A Formal Assignment.*

786. Form of assignment. — An assignment of a mortgage is usually effected by a brief form in which the mortgage is identified by a recital of the names of the parties to it, of its date, and of the book and page in the registry where it is recorded, without any other description of the property.¹ If the reference

¹ The form of assignment in common use in New England is generally as follows:—

“Know all men that I, _____, of _____, the mortgagee named in a certain mortgage deed given by _____, to secure the payment of _____ dollars, dated _____, and recorded in _____ Registry, book _____, page _____, in consideration of _____ dollars to me paid by _____, of _____, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over to the said _____, the said mortgage deed, the real estate thereby conveyed, and the note and claim thereby secured.

“To have and to hold the same to the said _____, and his heirs and assigns, to their own use and behoof forever.

“In witness whereof, I, the said _____, hereunto set my hand and seal this _____ day of _____, in the year _____.”

If the assignment is indorsed upon the mortgage deed the phraseology is changed by reference to the within mortgage deed, and the form thereby made shorter. If the assignment be by an assignee he should be so described.

The common form of an assignment as used in New York and some other states is as follows:—

“Know all men by these presents, that I, _____, of _____, in consideration of _____ dollars, to me paid, have sold, bargained, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto _____, of _____, a certain indenture of mortgage, bearing date the _____ day of _____, 18____, made by _____, of _____, to secure the payment of _____ dollars, payable in _____ years from the date thereof, with interest semi-annually, at the rate of _____ per cent., which mortgage is recorded &c., together with the bond or obligation therein described, and the money due, and to grow due, thereon, with the interest:

“To have and to hold the same unto the said _____, his executors, administrators, and assigns, forever, subject only to the proviso in the said indenture of mortgage mentioned; and I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but at his own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest; and in case of payment, to discharge the same as fully as I might or could do, if these presents were not made.

“In witness, &c.”

to the mortgage is so deficient that the register cannot tell by the description what mortgage is intended, and therefore omits to make the usual reference to the assignment on the margin of the record of the mortgage, the assignee may lose all benefit of the record.¹ It is usual to deliver with the assignment the original mortgage; but this is not essential.² It is, however, essential to a formal and complete assignment that the note or bond secured by the mortgage should be indorsed or otherwise assigned, and delivered with the assignment; or at any rate that an intention should be manifest to assign the mortgage debt to which the mortgage is only an incident; otherwise the assignment will only pass a naked legal title to the land.

787. The legal title to a mortgage can only be transferred by deed,³ except in those states where the common law character of the mortgage as an estate in land has given place to the doctrine that the mortgage is a mere chattel interest.

An assignment though indorsed upon the mortgage, and delivered with it, if not under seal, conveys only an equitable interest.⁴ It does not pass the legal estate, though it will authorize the assignee to enforce the mortgage in equity.⁵ It must also contain the words necessary in an ordinary deed of land to pass the legal estate, as for instance words of grant.⁶

Forms much briefer than these are in use in some states; for instance, in MARYLAND it is provided by Statute Code, art. 24, § 31, and Laws 1868, p. 693, that an assignment of a mortgage indorsed upon the original in the following form, or to like effect, shall be deemed sufficient to convey to the assignee every right which the assignor had at the time under the mortgage:—

"I hereby assign the within mortgage to _____ . Witness my hand and seal, this _____ day of _____, (Seal.)"

¹ Moore v. Sloan, 50 Barb. (N. Y.) 442.

² Warden v. Adams, 15 Mass. 233.

³ Warden v. Adams, 15 Mass. 233; Parsons v. Welles, 17 Mass. 419; Adams v. Parker, 12 Gray (Mass.), 53; Douglass v. Durin, 51 Me. 121; Smith v. Kelley, 27 Me. 237; Dorkray v. Noble, 8 Greenl. (Me.) 278; Dwinel v. Perley, 32 Me. 197;

Lyford v. Ross, 33 Me. 197; Warren v. Homestead, 33 Me. 256; Givan v. Tout, 7 Blackf. (Ind.) 210; Burton v. Baxter, Ib. 297; Henderson v. Pilgrim, 22 Tex. 464, 478. Although the language of the assignment creates a trust in the assignee, if it vests in him the legal title he can foreclose it. Phelps v. Townsley, 10 Allen (Mass.), 554.

⁴ Adams v. Parker, *supra*.

⁵ Kinna v. Smith, 3 N. J. Eq. (2 Green) 14.

⁶ Cottrell v. Adams, 2 Biss. 351. "The proper technical words of an assignment are 'assign, transfer, and set over.' But the words 'give, grant, bargain, and sell,' or any other words, which show the intent of the parties to make a complete transfer, will amount to an assignment." 4 Cruise Dig. 88.

In NEW JERSEY it is provided by stat-

An assignment by deed puts the assignee in the place of the mortgagee.¹ It passes the legal estate, and enables the assignee to foreclose in his own name. The mortgagee has no longer any right or interest in, or claim to the lands mortgaged, and an action in his name in respect to them can be no longer maintained.²

The second or third or any subsequent assignee taking the mortgage and note before maturity takes the same estate and the same rights that the first assignee had.³

788. Consideration.—Whether the assignee of a mortgage has paid value for it or not does not concern the mortgagor, except in reference to his interposing an equitable defence in the way of payment or set-off.⁴ Although the assignee has purchased the mortgage for less than the amount due upon it, it is none the less a valid security for the entire debt.⁵

Neither the mortgagor, nor a purchaser subject to the mortgage, can redeem except by paying the amount due on the mortgage.

If a mortgage be made without consideration for the purpose of being negotiated, the price paid by the assignee becomes the consideration of the mortgage, and makes it a valid security.⁶ The assignee is not, however, bound to see that the money he pays for it is applied to the use of the mortgagor.⁷

789. Possession of the mortgagor does not prevent assignment.—After a mortgagee has been disseised he cannot

ute that mortgages shall be assignable at law, and that the assignee may sue in his own name. The assignment must be in writing, but need not be under seal. *Nixon's Dig.* p. 613; *Mulford v. Peterson*, 35 N. J. L. 127.

In PENNSYLVANIA, also, it is provided that an assignee may maintain *scire facias* or other suit, upon a mortgage and bond in his own name; but the assignment should be a formal one, under seal, and attested by two witnesses. 1 *Brightly's Pardons Dig.* p. 485; and see *Twitchell v. McMurtrie*, 77 Pa. St. 383. Although a formal assignment passes the legal estate, and the assignee may sue in his own name, yet a mortgage is not considered a convey-

ance of real estate, except in form, while it is in fact only a security for money. *McCandless v. Engle*, 51 Pa. St. 309.

¹ *Hills v. Elliot*, 12 Mass. 26.

² *Gould v. Newman*, 6 Mass. 239. See *Reading of Judge Trowbridge*, 8 Mass. 551; *Pryor v. Wood*, 31 Pa. St. 142.

³ *Hoitt v. Webb*, 36 N. H. 158.

⁴ *Adair v. Adair*, 5 Mich. 204.

⁵ *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Knox v. Galligan*, 21 Wis. 470; *Pease v. Benson*, 28 Me. 336.

⁶ *Croft v. Bunster*, 9 Wis. 503; *Schafer v. Reilly*, 50 N. Y. 61.

⁷ *Westervelt v. Scott*, 11 N. J. Eq. (3 Stock.) 80; *McCurdy v. Agnew*, 8 N. J. Eq. (4 Halst.) 733.

make a valid assignment. In this respect the general doctrine applies that a disseisee, without an entry and delivery of the deed on the land, cannot convey a title valid as against the disseisor.¹ Ordinarily, however, the possession of the mortgagor is the possession of the mortgagee, and is not adverse; and such possession is therefore no obstacle to an assignment.² Even exclusive possession by the mortgagor, with a claim of exclusive ownership does not of itself amount to a disseisin of the mortgagee. The possession of the mortgagor being the possession of the mortgagee, it follows that the disseisin of the mortgagor is the disseisin of the mortgagee, and so long as the disseisor is in possession, the mortgagee cannot pass his interest in the land by a deed of assignment.³ From the disseisin of the mortgagor an intent to disseise the mortgagee who holds under him follows as a matter of course, unless the disseisor expressly recognizes the mortgagee's title.⁴

A second mortgagee may make a valid assignment of his interest, although he has at the time been ousted from possession by one claiming under a prior mortgage from the same mortgagor.⁵

In New Hampshire it is settled rule that a conveyance by a mortgagee not in possession does not pass the debt secured by the mortgage, and does not pass any interest in the land; but a devise of his interest in the mortgaged premises passes the debt secured. The intention of the testator governs the construction of the will.⁶

790. Delivery is, of course, as essential to the validity of an assignment of a mortgage, as it is to the validity of the mortgage itself; and therefore if it be executed and acknowledged, and made complete in every other way, if it be not delivered to the assignee it amounts to nothing.⁷

To constitute a delivery of an assignment, an intention to pass

¹ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Hunt v. Hunt*, 14 Pick. (Mass.) 385.

² *Murray v. Blackledge*, 71 N. C. 492; *Sheridan v. Welch*, 8 Allen, 166; and see *James v. Morey*, 2 Cow. (N. Y.) 246; *Converse v. Scarls*, 10 Vt. 578; *Gould v. Newman*, 6 Mass. 239; *Reading of Judge Trowbridge*, 8 Mass. 551.

³ *Poignand v. Smith*, 8 Pick. (Mass.) 272; S. C. 6 Ib. 172.

⁴ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Lincoln v. Emerson*, 108 Mass. 87.

⁵ *Nichols v. Reynolds*, 1 R. I. 30.

⁶ *Clark v. Clark*, 56 N. H. 105, and cases cited.

⁷ *Rose v. Kimball*, 16 N. J. Eq. 185; *Rankin v. Major*, 9 Iowa, 297.

the property in the debt and mortgage must be shown. A request by the assignor to the assignee to have the assignment recorded as soon as the former should die, when it is shown that the assignee did not have exclusive control of it, but that the assignor collected interest on the mortgage, and otherwise treated it as his own property, and never indorsed or delivered the mortgage note, makes manifest an intention that the assignment should not be operative until the death of the assignor; and consequently it is a nullity as being inconsistent with the statute of wills.¹

791. The assignee should notify the owner of the estate of his rights. — The assignee of a mortgage, as a practical matter, should always give notice of the assignment to the holder of the equity of redemption, if he wishes to protect himself against payments which may be made in good faith to the assignor. The recording of the assignment is not of itself such notice of the assignment as will afford such protection.² The fact that the mortgagor in paying an instalment of the interest or principal does not require the production of the mortgage note or bond, for the purpose of having the payment indorsed upon it, does not raise a presumption of bad faith on his part; and under some circumstances no such presumption would arise from his omission to require a delivery up of the securities, upon paying off the whole amount of the mortgage debt;³ though under other circumstances such omission would make him chargeable with knowledge of the transfer, and would make the payment ineffectual.⁴

If the assignee of a mortgage fails to give notice of the assignment, and so acts as to authorize the mortgagor to believe that the mortgagee is still the owner of it, he is estopped from denying the right of the mortgagor to deal with the mortgagee as the owner.⁵

¹ *Shurtleff v. Francis*, 118 Mass. 154.

² See *Reed v. Marble*, 10 Paige (N. Y.), 413; *Van Keuren v. Corkins*, 6 Thomp. & C. (N. Y.) 355; 4 Hun, 129; *James v. Johnson*, 6 Johns. (N. Y.) Ch. 427; 2 Cow. 246; *N. Y. Life Ins. & Trust Co. v. Smith*, 2 Barb. (N. Y.) Ch. 82; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, 111; *Johnson v. Carpenter*, 7 Minn. 176; *Horstman v. Gerker*, 49 Pa. St. 282.

³ *Van Keuren v. Corkins*, *supra*; *Hubbard v. Turner*, 2 McLean, 519.

⁴ *Brown v. Blydenburgh*, 7 N. Y. 141; *Doubleday v. Kress*, 50 N. Y. 410; *Foster v. Beals*, 21 N. Y. 247; *Mitchell v. Cook*, 17 How. (N. Y.) Pr. 110; 29 Barb. 243.

⁵ *McCabe v. Farnsworth*, 27 Mich. 52.

2. *Whether an Assignment may be compelled.*

792. A mortgagee cannot be compelled in equity to assign his mortgage, on receiving payment, in order that subsequent parties in interest may adjust their respective rights. He is entitled to be paid, or to proceed to foreclosure, without being obliged to investigate titles arising after his own. He may release his interest on receiving payment, and leave after claimants to the preferences which their respective titles give them when his mortgage is discharged.¹

A mortgagee is not bound to protect other parties who have interests in the property by assigning his mortgage to any one. His whole duty is performed by releasing his interest on receiving payment. When, therefore, the equity of redemption of a bankrupt had been sold by his assignee, but the bankrupt and his wife having a homestead, and the wife an inchoate right of dower, sought to obtain an assignment of the mortgage so that it might continue as security for the amount paid, it was held that they were not entitled to an assignment which their bill prayed for, but that the bill might be maintained as a bill to redeem.² Any one having a subsequent incumbrance upon the mortgaged estate can protect his interest, by paying the prior mortgage when it is due, and he thereupon succeeds by subrogation, on settled principles of equity, to the rights and interests of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or transfer by the prior mortgagee. He is not entitled to an assignment.³

The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself. There must be some equitable reason for it, as that the redeeming party is in the position of a surety and is entitled to be subrogated to the position of the holder of the mortgage; or that the mortgagee, or the mortgagor, or both of them were about to do something to injure or destroy his own security.⁴ It has been erroneously

¹ *Butler v. Taylor*, 5 Gray (Mass.), 455. See § 1064.

² *Lamb v. Montague*, 112 Mass. 352; *Butler v. Taylor*, 5 Gray (Mass.), 455; and see *McCabe v. Bellows*, 7 Gray (Mass.), 148, as to requirement that whole mortgage be redeemed.

³ *Ellsworth v. Lockwood*, 42 N. Y. 89, 96, and cases cited; *Burnet v. Denniston*, 5 Johns. (N. Y.) Ch. 35; *Hubbard v. Ascutney Mill Dam Co.* 20 Vt. 402.

⁴ *Ellsworth v. Lockwood*, 42 N. Y. 89; *Vandercook v. Cohoes Sav. Inst.* 5 Hun (N. Y.), 641.

assumed in some cases that the right to compel an assignment of a prior mortgage and the debt flows from the right of redemption.¹ After a review of the cases upon this point in New York, Mr. Justice Sutherland² says: "Upon the whole, I do not think it can be said to be the law of this state, that the right to redeem a mortgage, that is, the right to compel the holder of it to accept or receive payment of it, after it is due and payable, carries with it the right, upon such redemption, to an assignment of the mortgage, and of the bond or other instrument evidencing the mortgage debt, or of either, unless the redeeming party has the position of surety, or can be regarded as surety for the mortgage debt."

793. When an assignment may be compelled in equity. — Sometimes an assignment may be compelled in a court of equity. This may be done when the circumstances are such that the mortgagee has no beneficial interest in the security, but in fact holds it in trust for another who is entitled to the control of it.³

In like manner, when the mortgagor has conveyed the premises, subject to the mortgage, and the holder of the mortgage afterwards attempts to enforce it against him, he is entitled to be subrogated to the position of the holder, who may therefore be ordered to assign the bond and mortgage to him, or to a third person for his benefit, on receiving the amount due upon it.⁴ "This cannot prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice, or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the incumbrance without any contribution toward its discharge⁵ and satisfaction from the land." It is proper, too, that the assignment, if so de-

¹ *Pardee v. Van Anken*, 3 Barb. (N. Y.) 536; *Jenkins v. Continental Ins. Co.* 12 How. (N. Y.) Pr. 66.

² In *Ellsworth v. Lockwood*, *supra*.

³ *Mount v. Suydam*, 4 Sandf. (N. Y.) Ch. 399. To be entitled to an assignment, one must be the holder of the next lien. *Bishop v. Ogden*, 9 Phila. (Pa.) 524. For

other cases in which an assignment may be compelled in equity, see *Lyon's Appeal*, 61 Pa. St. 15. See § 1065.

⁴ *Johnson v. Zink*, 52 Barb. (N. Y.) 396; 51 N. Y. 333; *Baker v. Terrell*, 8 Minn. 195.

⁵ Per Chief Commissioner Lott, on appeal, in *Johnson v. Zink*, *supra*.

sired, should be made to another person for the benefit of the mortgagor.

An assignment in such cases furnishes the only complete protection, for if the mortgagee should cancel the mortgage upon the record, or release the mortgaged premises upon receiving payment, the owner of the equity of redemption might sell the property to a *bonâ fide* purchaser, or a creditor of his might attach it or levy an execution upon it.

3. *Who may make an Assignment.*

794. A mortgage made to two persons jointly, to secure a note payable to them jointly, may be assigned by one of them in the name of both ; but if it secures separate debts, both must join in an assignment.¹ Where a mortgage note was indorsed to two persons, each was regarded as entitled to one half interest in the note and the proceeds of it, and was held to be incapable of transferring any other or greater interest.² Where a mortgage is made to two or more persons and one of them dies, it would seem that if the mortgage was given to secure a joint debt, the survivor or survivors might assign the mortgage ; but if given to secure separate debts or obligations, it is necessary to join the representatives of the deceased mortgagee.³

795. One of several trustees who hold a mortgage cannot make a valid assignment of it. All must join.⁴ On the death of one trustee, the survivors succeed to the rights to which all of them were before jointly entitled. But a mere abandonment or mismanagement of a trust, by one trustee, does not divest his legal interest in the trust property, and transfer it to the other trustees. Such transfer can be made only by deed, or by some legal process.⁵

¹ *Bruce v. Bonney*, 12 Gray (Mass.), 107, 110. See § 135.

² *Herring v. Woodhull*, 29 Ill. 92.

³ *Gilson v. Gilson*, 2 Allen (Mass.), 115, 117 ; *Savary v. Clements*, 8 Gray (Mass.), 155 ; *Burnett v. Pratt*, 22 Pick. (Mass.), 556.

⁴ *Austin v. Shaw*, 10 Allen (Mass.), 552 ; *Webster v. Vandeventer*, 6 Gray (Mass.), 428.

⁵ *Webster v. Vandeventer*, *supra*. In this case one of the persons to whom, "as trustees of the society of Shakers in Enfield," a mortgage had been assigned, had left the society and moved away, and engaged in other business. He had moreover received a large sum of money from the society in consideration of his claims.

796. In general one of two or more executors or administrators may make a valid assignment of a mortgage without the others joining in the act of transfer ;¹ and this rule has been held to apply as well to a mortgage taken by executors in their own names as such, after the death of their testator, as to one given to the testator in his lifetime, provided the money when received would be assets of the testator's estate.²

An assignment by the executors of the mortgagee to a son of the testator, who is also a co-executor, is valid.³

An executor or administrator can generally assign a mortgage without a license for that purpose, inasmuch as a mortgage is regarded as only a chattel interest which immediately vests in the personal representative of the mortgagee upon his decease.⁴

When a mortgage has been foreclosed in the hands of an executor or administrator, the chattel interest of the mortgage has then become real estate, and he should obtain a license of court before selling the premises ; yet in such case a conveyance by him without license would not be void, but only voidable by the heirs or creditors of the deceased.⁵

797. Assignment by foreign administrator. — Although a mortgage is regarded as a mere chattel interest, yet a foreign administrator cannot, by virtue of his appointment in another state, assign the mortgage.⁶ Titles to real estate are regulated and established by the *lex loci rei sitæ* ; and whenever the official act of an executor or administrator is necessary to make title to real estate, his authority must appear by letters testamentary, or letters of administration granted in the state where the land is situated.⁷

¹ Bac. Ab. Exr's & Admr's, D. ; George v. Baker, 3 Allen (Mass.), 324 ; Bogert v. Hertell, 4 Hill (N. Y.), 492.

² Bogert v. Hertell, *supra* ; S. C. 9 Paige (N. Y.), 52 ; 3 Edw. Ch. 20. The court of errors overruled the opinions of the chancellor and vice-chancellor to the contrary.

³ Hitchcock v. Merriek, 15 Wis. 522.

⁴ Ladd v. Wiggin, 35 N. H. 421 ; Ex parte Blair, 13 Met. 126 ; Crooker v. Jewell, 31 Me. 306.

In MASSACHUSETTS, by statute 1788, c. 51, § 1, sale of a mortgage might be made by an executor or administrator without

license of the Probate Court in case the mortgagee had died "before recovery of seisin and possession." The Rev. Stat. 1836, c. 65, §§ 11, 14, rendered such license necessary. Ex parte Blair, 13 Met. 126 ; but by statute 1849, c. 47, Gen. Stat. c. 96, § 12, and c. 98, § 5, authority was given to make the sale without license.

⁵ Baldwin v. Timmins, 3 Gray (Mass.), 302.

⁶ Cutter v. Davenport, 1 Pick. (Mass.) 81.

⁷ Hutchins v. State Bank, 12 Met. (Mass.) 421, 424.

798. A treasurer or other officer of a corporation has no authority by virtue of his office merely, and aside from the authority of a by-law or a special power given by the company, to execute an assignment of a mortgage, and his use of the seal of the corporation, of which he has charge, does not serve to give the assignment so made by him any validity.¹ Of course a subsequent ratification of the act by the corporation will supply the original want of authority, and make the act valid.

799. Assignment by an incorporated association. — If a mortgage be made or assigned to certain persons as trustees of an association not incorporated, the legal title vests in these persons jointly, and no valid assignment can be made by the association, or by one of the mortgagees, but all must join in the deed in order to make a valid assignment.² In the absence of any evidence that power of alienation by such trustees is restrained by the by-laws of the association, their assignment of a mortgage will pass the legal title.³

The organization of a voluntary loan fund association into a corporation does not transfer their property without a formal conveyance or assignment.⁴ Neither does the title vest in new trustees who may be elected from time to time, but remains in the original trustees or their survivors until transferred by their deed.⁵

800. Partnership. — A mortgage to a partnership consisting of several members should be assigned by a deed executed by all the partners; for although it belongs to the partnership, the legal estate is in the individual members of it, as tenants in common. One partner cannot make a legal assignment by executing an assignment in the name of the firm; ⁶ but he can make an equitable assignment by a transfer of the debt, and therefore a mortgage to a partnership to secure a debt due the firm will equitably pass by an assignment of all debts due the firm, executed in the name of

¹ *Jackson v. Campbell*, 5 Wend. (N. Y.) 572.

² *Austin v. Shaw*, 10 Allen (Mass.), 552; *Webster v. Vandeventer*, 6 Gray (Mass.), 428; *Chapin v. First Universalist Church in Chicopee*, 8 Gray (Mass.), 580.

³ *Manahan v. Varnum*, 11 Gray (Mass.), 405.

⁴ *Manahan v. Varnum*, 11 Gray (Mass.), 405; *Holland v. Crnft*, 3 Gray (Mass.), 173.

⁵ *Peabody v. Eastern Methodist Society in Lynn*, 5 Allen (Mass.), 540.

⁶ And see *Dillon v. Brown*, 11 Gray (Mass.), 179. See §§ 119-122.

the firm by one member of it, to secure a debt due from the firm to the assignee.¹ Although it is a general rule that a partner cannot bind his copartners by an instrument under seal, yet as he can make an equitable assignment without using a sealed instrument at all, the addition of a seal does not vitiate such an assignment, any more than the addition of a seal to a bill of sale of goods would vitiate the sale.²

801. Assignment by attorney. — A mortgage being an estate or interest in land can be assigned only by deed. An attorney executing an assignment in behalf of his principal must have authority under seal. That he is an attorney in fact is not sufficient, without a subsequent ratification. But if one partner execute an assignment in behalf of his copartner, in the course of the partnership business, under the authority of the partnership articles which are under seal, and provide that the business of the partnership shall be transacted by the person who executed the assignment, the authority is sufficient. It is not necessary to the validity of the foreclosure of the mortgage so assigned that the authority to execute the assignment should be recorded.³

802. Mortgage of indemnity. — The condition of a mortgage of indemnity is saved if the debt for which the indemnity is taken is paid by the principal debtor, according to its terms. The mortgage in that case never becomes operative and available, and the mortgagee has then no interest which he can assign. It is immaterial in this respect whether the original debt is paid by the mortgagor in money, or by a new note with other sureties; the mortgagee not being upon the renewed note is exonerated and discharged from his liability, and his interest under his mortgage having ceased, he cannot pass any interest by an assignment of it, even to the new sureties.⁴

¹ *Dubois's App.* 38 Pa. St. 231.

² *Everit v. Strong*, 5 Hill (N. Y.), 163.

³ *Morrison v. Mendenhall*, 18 Minn. 232; see *Atkinson v. Patterson*, 46 Vt. 750.

⁴ *Abbott v. Upton*, 19 Pick. (Mass.) 434; *Bonham v. Galloway*, 13 Ill. 68. The condition in this latter case was that if the mortgagor should pay and satisfy his

note, by renewal or otherwise, then the mortgage should be void; and it was renewed with different sureties. One ground of the decision was that a transfer to others was not within the contemplation of the parties at the time of the execution of the mortgage. But the same decision was reached in the former case without this special form of condition. See §§ 379-387.

A mortgage of indemnity is assignable after the mortgagee has paid the debt against which he is indemnified; but until that time he has nothing that he can assign.¹ If, however, he procures the payment of the debt by a third person for his benefit, he may transfer the mortgage to such third person as security for the payment, although this be done before the maturity of the debt; and the mortgagor cannot claim that such payment is a performance of the condition of the mortgage, so as to revest the title in him.²

It must appear, however, that the assignment was made, or at least agreed upon, at the time the assignee paid the debt for which the mortgage was given as indemnity; otherwise, the payment will discharge the debt, and the assignment will not pass any interest as against any intervening interest. Thus, for instance, where a third person under an agreement with the principal debtor, and not with the surety, who held the mortgage, paid the debt in three instalments, but did not take an assignment of the mortgage until the time of paying the last instalment, it was held that in the absence of proof of any arrangement with the mortgagee for an assignment, the first two payments extinguished the mortgage *pro tanto*, and that it was not in the power of the parties to revive it as against intervening incumbrancers.³

803. The assignment of a mortgage conditioned for the support of the mortgagees, after a breach of the condition, does not operate as a release of the claim for support. The assignee may claim the performance of the condition of the mortgage for the benefit of the mortgagee. The mortgagor has no occasion to object to the assignment. This affects his rights and duties in only one respect; if he has notice of the assignment, he must pay to the assignee any sum that is due as damages for past breaches of the condition to support.⁴

¹ Abbott v. Upton, 19 Pick. (Mass.) 434; Wallace v. Goodall, 18 N. H. 439; Hall v. Cushman, 16 Ib. 462; Weeks v. Eaton, 15 Ib. 145. And see Jones v. Quinpiack Bank, 29 Conn. 25.

² Murray v. Catlett, 4 Greene (Iowa), 108; Camp v. Smith, 5 Conn. 80. The condition of the mortgage in this case was that the mortgagor would "well and truly pay said note according to its tenor." Be-

fore the maturity of the note he told the mortgagee that he must provide for the note; and four days before it became due the mortgagee arranged for its payment by another to whom he transferred the mortgage.

³ Pelton v. Knapp, 21 Wis. 63.

⁴ See §§ 388-395; Mitchell v. Burnham, 57 Me. 314.

4. *What constitutes an Assignment.*

804. Assignment of mortgage without the debt. — In general, if an assignment of a mortgage be made without any transfer of the note or bond secured by the mortgage, the assignee takes only a naked legal estate, which he will hold in trust for the owner of the note or other mortgage debt.¹ The transfer of the debt is essential to an effective assignment of the mortgage.

When it is said that a transfer of a mortgage without the debt secured by it is a nullity,² the qualification should be made that where the mortgagee has possession by virtue of his mortgage, or where the mortgagee is not in possession, but the condition has been broken, a conveyance or assignment of the mortgaged premises would be valid to transfer the right of possession.³

A purchaser of the mortgage title, not finding the note in the possession of the mortgagee, is held to take it subject to the rights of any person to whom the mortgage debt has been previously assigned.⁴ If, however, a mortgagee makes a deed or release of the premises or a part of them to a person holding from other sources a valid title to the premises, subject only to the incumbrance of the mortgage, and who has no object in acquiring possession of the personal obligation, but is only concerned in perfecting his title, a deed or transfer unaccompanied with the mortgage debt avails to discharge the mortgage lien. If, therefore, the purchaser of a portion of an estate subject to a mortgage, which the mortgagee has assigned by an unrecorded assignment, afterwards takes a quitclaim deed of the whole estate from the mortgagee, he acquires a good title to the part which he previously held as against the mortgagee; but as to the residue no such title as would prevail against the prior purchaser of the mortgage debt accompanied by an assignment of the mortgage, though not recorded.⁵ "As a purchaser," says Mr. Justice Dewey, delivering the opinion

¹ *Merritt v. Bartholiek*, 36 N. Y. 44; S. C. 47 Barb. 253; *Aymar v. Bill*, 5 Johns. (N. Y.) Ch. 570; *Jackson v. Willard*, 4 Johns. (N. Y.) 41; *Cooper v. Newland*, 17 Abb. (N. Y.) Pr. 342; *Swan v. Yaple*, 35 Iowa, 248; *Pope v. Jacobs*, 10 Iowa, 262; *Sangster v. Love*, 11 Iowa, 580; *Peters v. Jamestown Bridge Co.* 5 Cal. 334; *Doe v. McLoskey*, 1 Ala. 708; *Carter v. Bennett*, 4 Fla. 283; *Johnson v.*

Cornett, 29 Ind. 59; *Bailey v. Gould*, Walk. (Mich.) 478; *Thayer v. Campbell*, 9 Mo. 280; *Bell v. Morse*, 6 N. H. 205; *Hutchins v. Carleton*, 19 N. H. 487.

² *Carpenter v. Longan*, 16 Wall. 271; *Thayer v. Campbell*, 9 Mo. 277.

³ *Pickett v. Jones*, 63 Mo. 195.

⁴ *Kellogg v. Smith*, 26 N. Y. 18.

⁵ *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

of the court, "he must have known that the possession of the debt was essential to an effective mortgage, and that without it he could not maintain an action to foreclose the mortgage. The not finding it in the possession of the mortgagee, and not stipulating for any transfer of such debt, are circumstances that should estop him from setting up any title against the *bonâ fide* purchaser of the debt, who had possession of the bond, and an assignment of the mortgage in due form to vest the legal estate in him as against the assignor, and only defective as to any others, in not being recorded."

805. An assignment of the mortgage generally carries the debt. — An assignment by the mortgagee of his mortgage interest of itself conveys the right to receive payment of the notes, if these be actually sold and delivered to the assignee of the mortgage. In a proceeding to foreclose it is necessary to produce the notes in order to rebut the presumption of payment which would result from their absence. The note is the most direct and proper evidence of the debt. If the note be not produced its absence must be accounted for.¹ But the beneficial interest in the debt is, however, generally included in an assignment of the mortgage, although the terms of the assignment embrace the mortgage alone. This would be the presumed intention of the parties in all cases when the debt has not been already transferred to another.²

The mortgage being merely an incident of the debt cannot be assigned separately from it so as to give any beneficial interest. The incident may pass by a grant of the principal, but not the principal by the grant of the incident.³

Whether a deed by the mortgagee or a formal assignment of a mortgage by him, without a transfer of the notes, passes the beneficial interest in the security is a question to be determined by the intention of the parties, which may be gathered not merely from the words of the deed or assignment, but from the situation of the parties and the nature of the transaction.⁴ The mere circumstance that the assignment would be inoperative, unless the

¹ King v. Harrington, 2 Aikens (Vt.), 33; Edgell v. Stanfords, 3 Vt. 202. lick, 36 N. Y. 44; S. C. 47 Barb. 253; Cooper v. Newland, 17 Abb. (N. Y.) Pr.

² Northampton Bank v. Balliet, 8 W. 342. ³ Hitchcock v. Merrick, 18 Wis. 357.
& S. (Pa.) 311; Philips v. Bank of Lew- ⁴ Bukley v. Chapman, 9 Conn. 5.
istown, 18 Pa. St. 394; Merritt v. Bartho-

debt be held to pass with it, is not sufficient, it would seem, to give the assignment that effect. The result of such holding would be to reverse the maxim that the incident passes by a grant of the principal, and would establish the contrary rule that the principal follows the incident.¹ The fact that an assignment was made at the request of the mortgagor to one who advanced him money at the time is evidence of an agreement between the parties that the mortgage should no longer continue a security for the payment of the debt which it was originally given to secure, but should be security for the debt then created.²

806. The mere delivery of the mortgage deed without the bond or note does not constitute a transfer of it either by way of sale or pledge, though the full consideration was paid or money was advanced upon it.³ There is in such case a presumption against any transfer. In England such a deposit of the papers would constitute a valid lien, and is a very common mode of securing a loan. But in this country, under the recording acts, no lien upon real estate can be created by a deposit of title deeds. Although an assignee by a regular deed of assignment has knowledge that the mortgage has been deposited with a solicitor for the purpose of having an assignment of it made to another, he acquires, by the deed of assignment and an indorsement of the note, a prior lien upon the mortgaged property, and it does not matter that the mortgage deed itself is not delivered to him.

807. A formal assignment of the mortgage and delivery of note without indorsement is sufficient evidence of title. — When a mortgage has been formally assigned and the mortgage note delivered to the assignee without any indorsement of it, the

¹ Per Parker, J., in *Merritt v. Bartholick*, 36 N. Y. 44.

² *Campbell v. Burch*, 1 Lans. (N. Y.) 178.

³ *Bowers v. Johnson*, 49 N. Y. 432; *Merritt v. Bartholick*, 36 N. Y. 44; S. C. 47 Barb. 253. In the latter case Mr. Justice Parker, in the Court of Appeals, said: "The act done by Merritt, the mortgagee, was the delivery of the mortgage to Wentworth, and the purpose of the delivery was

to secure the payment of the debts of the mortgagee to Wentworth. Does it necessarily follow that the intention of the parties was to transfer the bond? The referee has not found either way upon this question of intent, and therefore, unless the intent in question is to be inferred, as a matter of legal necessity, from what he does find, it must be held not to have existed." *Warden v. Adams*, 15 Mass. 233. See §§ 179-187, 457.

mortgagor is not justified in refusing payment to the assignee on the ground that the note has not been indorsed by the payee.¹ The formal assignment, duly acknowledged and recorded, and the possession of the note, is the best possible evidence of ownership, and the assignee is entitled to demand and enforce payment whether the note is indorsed or not. Such an assignment is a good equitable transfer of the mortgage and note.² It is sufficient evidence of an intention to pass the beneficial interest in this security.

When, however, there is no separate obligation for the mortgage debt, and no express covenant in the mortgage for the payment of it, then the remedy upon the mortgage is confined to the lands, and an assignment of the mortgage necessarily transfers all the mortgagee's rights under it.³ The mortgage is then the principal and only thing, and is not an incident to anything else.

The assignee of a mortgage without the debt can maintain no action upon it except at the request of the holder of the bond or note secured by it. Judgment could only be entered upon producing the separate obligation for the debt.⁴ According to the principles of equity courts, the assignee of the legal title, holding it as trustee for the benefit of the holder of the mortgage debt, would be compelled either to foreclose the mortgage for the benefit of the holder of the debt, or to assign it to him.

Contrary to the generally received doctrine it is held in Illinois that a mortgage cannot be assigned so as to vest the legal title in the assignee, unless the debt secured be of a character assignable at law; or in other words, unless it be negotiable. If it be negotiable, the assignee becomes the legal holder of the indebtedness, and the mortgage as a mere incident passes with it, and the legal title to that vests in the assignee. Therefore, it is held that a power of sale in a mortgage passes to the assignee in the latter case and may be exercised by him; but in the former case, the assignment vests only an equitable interest in the assignee,

¹ *Pease v. Warren*, 29 Mich. 9; and see 416; *Severance v. Griffith*, 2 Ib. 38; *King v. Harrington*, 2 Aik. (Vt.) 33. *Hone v. Fisher*, 2 Barb. (N. Y.) Ch. 560; Otherwise see *Kelly v. Burnham*, 9 N. *Coleman v. Van Rensselaer*, 44 How. (N. H. 20; *Thorndike v. Norris*, 24 N. H. Y.) Pr. 368.

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² *Pratt v. Skolfield*, 45 Me. 386.

³ *Caryl v. Williams*, 7 Lans. (N. Y.) 219.

⁴ *Webb v. Flanders*, 32 Me. 175; *Garron v. Sherman*, 6 N. J. Eq. (2 Halst.)

and therefore the power can be exercised only by the mortgagee himself.¹

808. A deed of release or quitclaim or other conveyance is sufficient to pass the interest of the mortgagee, when there is no separate obligation for the payment of the debt;² and is sufficient also when there is a separate obligation, and this is delivered with the deed.³ A warranty deed is not only equally effectual, but would also pass any title subsequently perfected by the mortgagee.⁴ Such also is the effect of a conveyance by one having an absolute title to property which he really holds by mortgage title, if the purchaser from him has notice of the separate defeasance or the circumstances which make the transaction a mortgage.⁵ There are other cases in which a deed of the land by the mortgagee will pass no interest at all, unless it be a mere naked legal estate. Such is the case when the mortgagee has already transferred the mortgage debt.⁶ Moreover, the deed alone will not pass the mortgage debt, unless the intention to transfer this as well is expressed in it. This would doubtless be the case when it appeared that the mortgagee had control of the debt.⁷

Where the legal title is regarded as remaining in the mortgagor, and the mortgagee only acquires a right to enforce payment of his claim, it is held that a deed made by the holder of the mortgage conveying all his "estate, title, and interest" in the real estate mortgaged will not operate as an assignment of the mortgage, for this is a conveyance of the land, in which he has no title. His interest is a chattel interest inseparable from the debt it was given to secure.⁸

¹ *Mason v. Ainsworth*, 58 Ill. 163.

506; *Lawrence v. Stratton*, 6 Cush.

² *Welch v. Priest*, 8 Allen (Mass.), 165; *Dorkrey v. Noble*, 8 Me. 278; *Hill v. More*, 40 Me. 525; *Hunt v. Hunt*, 14 Pick. (Mass.) 382; *Freeman v. M'Gaw*, 15 Pick. (Mass.) 82, 86; *Thompson v. Kenyon*, 100 Mass. 108; *Severance v. Griffith*, 2 Lans. (N. Y.) 38; *Weeks v. Eaton*, 15 N. H. 145.

(Mass.) 163, 169.

⁵ *Decker v. Leonard*, 6 Lans. (N. Y.) 264; *Leahigh v. White*, 8 Nev. 147.

⁶ *Bell v. Morse*, 6 N. H. 210; *Whitemore v. Gibbs*, 24 N. H. 484; *Weeks v. Eaton*, 15 N. H. 145; *Furbush v. Goodwin*, 25 N. H. 425; *Hobson v. Roles*, 20 N. H. 41.

³ *Dixfield v. Newton*, 41 Me. 221; *Dearborn v. Taylor*, 18 N. H. 153; *Hobson v. Roles*, 20 N. H. 41; *Furbush v. Goodwin*, 25 N. H. 425.

⁷ *Ellison v. Daniels*, 11 N. H. 274; *Parish v. Gilmanton*, *ib.* 298.

⁸ *Swan v. Yapple*, 35 Iowa, 248, and cases cited; and see *Aymar v. Bill*, 5 Johns. (N. Y.) Ch. 570. See §§ 17-59.

⁴ *Ruggles v. Barton*, 13 Gray (Mass.),

In like manner it is held that a conveyance by the mortgagee of all his right, title, and interest in the land passes nothing unless the debt be assigned, as the mortgage is a mere security incident to the debt.¹

It is held that an assignment of a mortgage to be effectual must either be formal, or it must appear from the instrument that it was intended to operate as an assignment. A conveyance by the mortgagee before entry for condition broken is inoperative, unless intended as an assignment of the mortgage and mortgage debt, and such intention be made to appear. Although the mortgage be in the form of an absolute deed and bond for reconveyance, if the bond is recorded with the mortgage the mortgagee cannot convey any interest in the property before condition broken, unless it be by assignment. Unless intended to operate as an assignment of the mortgage and a transfer of the debt, a conveyance by the mortgagee to a third person is entirely inoperative. The intention that a deed shall have this operation must be made to appear.²

But if the mortgagee be in possession, his conveyance of the mortgaged property is regarded as passing his mortgage interest, although no mention in terms is made of the debt, whether it be by warranty deed or quitclaim.³ It moreover transfers his right of possession, and enables the grantee, and those claiming under him, to maintain an action against any person who does not show a better title.⁴

809. Deed by heir before settlement of the estate.—Inasmuch as a mortgage is assets in the hands of the personal representative of a deceased mortgagee, a deed of the mortgaged premises by the heir before foreclosure, and before a decree of distribution of the estate, will not operate as an assignment of the mortgage,⁵ and will not even convey any title sufficient to enable the grantee to maintain a writ of entry against such heir.⁶ The administrator may, notwithstanding such deed, take possession of

¹ *Peters v. Jamestown B. Co.* 5 Cal. 335; *Nagle v. Macy*, 9 Cal. 428.

² *Greve v. Coffin*, 14 Minn. 345; *Johnson v. Lewis*, 13 Minn. 364; *Hill v. Edwards*, 11 Minn. 22, 29; *Gale v. Battin*, 12 Minn. 287.

³ *Lamprey v. Nudd*, 29 N. H. 299;

Smith v. Smith, 15 N. H. 55; *Hinds v. Ballou*, 44 N. H. 619.

⁴ *Wallace v. Goodall*, 18 N. H. 439; *Hutchins v. Carleton*, 19 N. H. 514.

⁵ *Douglass v. Durin*, 51 Me. 121; *Albright v. Cobb*, 30 Mich. 355.

⁶ *Taft v. Stevens*, 3 Gray (Mass.), 504.

the premises and foreclose the mortgage, if no redemption be made. The conveyance by the heir does not pass the legal estate, because he has no legal estate in the premises. The mortgage title as well as the debt vests solely in the administrator. If he obtains an irredeemable interest by foreclosure, this is only the ripening and perfecting of the interest he already has. He may then sell the lands by license of court for the payment of debts, and if not sold he holds them for the benefit of the same persons, and in the same proportions that he holds the personal estate of the deceased, and they may claim partition accordingly.¹

810. A mortgage of land by one whose only title to it is in mortgage passes his mortgage interest. It is in legal effect an assignment of his mortgage.² Although the debt be not at the time formally transferred with the mortgage, it may well be inferred that the intention of the parties was to make a complete assignment of the mortgage.³

811. A conveyance by a mortgagee of a part of the mortgaged estate to a third person is in like manner regarded as an equitable assignment of the mortgage to the extent of the purchase money of such part, especially when the purchaser has bought in good faith from a mortgagee in possession, with the assurance on his part that he had a perfect title.⁴ "It is as important," says Mr. Justice Hoar,⁵ "to be able to ascertain from the registry the existence or continuance of a mortgage, as of any other legal title. Not infrequently the whole or part of an estate held in mortgage is released or conveyed, when the debt is not paid. And in the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage

¹ Taft v. Stevens, *supra*, Gen. Stat. of Mass. c. 97, § 14.

² Murdock v. Chapman, 9 Gray (Mass.), 156; Central Bank v. Copeland, 18 Md. 305.

³ Dudley v. Cadwell, 19 Conn. 218.

In this case the mortgage notes were not delivered till long after the making of the mortgage, but the jury found that these were parts of one transaction, and that an

assignment of the mortgage was what was really intended.

⁴ McSorley v. Larissa, 100 Mass. 270; and see Wyman v. Hooper, 2 Gray (Mass.), 141; Welch v. Priest, 8 Allen (Mass.), 165; Grover v. Thatcher, 4 Gray (Mass.), 526; Raymond v. Raymond, 7 Cush. (Mass.) 605, 608.

⁵ Welch v. Priest, *supra*.

should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other." As already stated, a transfer by a mortgagee of his entire interest under a mortgage is ineffectual unless accompanied by the mortgage debt; but the rule is different when a portion only of the mortgaged premises is conveyed. A purchaser of a portion of the premises, having in view merely to acquire the title to land, has no occasion to acquire the debt, and the absence of it does not imply bad faith on his part.¹

The mortgagee by a deed to a third person of a part of the mortgaged premises transfers his interest in such portion, but he does not discharge it from the mortgage so far as the mortgagor is concerned; only a release to him or payment by him will have that effect.²

812. An ineffectual foreclosure sale operates as an assignment of the mortgage.—An ineffectual sale under a power in the mortgage,³ or an irregular sale under a decree of foreclosure,⁴ operates as an assignment of the mortgage to the purchaser, if he has paid the purchase money and it has been applied to the payment of the mortgage debt. In like manner the assignment of a decree in a foreclosure suit for a residue of the debt after a sale of the property, if the decree proves to be invalid by reason of there being no personal service or otherwise, will operate as a transfer of the mortgage debt, with authority to enforce it by appropriate remedies.⁵ The assignment of a judgment rendered on the mortgage note or bond is an equitable assignment of the mortgage;⁶ and an assignment of a judgment for a part of the mortgage debt carries an interest *pro tanto* in the mortgage.⁷

As has already been observed, in several of the states a mortgage is considered merely a chattel interest, and not a conveyance of land within the statute of frauds. In these states the tech-

¹ Wolcott v. Winchester, 15 Gray (Mass.), 461.

² Wyman v. Hooper, 2 Gray (Mass.), 141; Grover v. Thatcher, 4 Ib. 526.

³ Brown v. Smith, 116 Mass. 108; Meritt v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320.

⁴ Brobst v. Brock, 10 Wall. 519; Olmsted v. Elder, 2 Sandf. (N. Y.) 325; Moore

v. Cord, 14 Wis. 213; Muir v. Berkshire, 52 Ind. 149; Johnson v. Robertson, 34 Md. 165; Stackpole v. Robbins, 47 Barb. (N. Y.) 212; and see Hill v. More, 40 Me. 515.

⁵ Lillibridge v. Tregent, 30 Mich. 105; and see Drury v. Morse, 3 Allen (Mass.), 445.

⁶ Wayman v. Cochrane, 35 Ill. 152.

⁷ Pattison v. Hull, 9 Cow. (N. Y.) 747.

nical views of the rights of the parties to a mortgage have given place to the equitable views of it entertained by courts of equity, and a parol assignment is sufficient if accompanied by a transfer of the bond or other evidence of the mortgage debt.

5. *Equitable Assignments.*

813. An equitable assignment of a mortgage may be made by a sale of it, without either a formal transfer of the mortgagee's interest in the property, or an indorsement of the note.

The equitable interest of the purchaser enables him to deal with the mortgage for all beneficial purposes.¹ He may enforce it against the property and the person liable upon it. Under the old practice this would be done in the name of the assignor or person in whom the legal title remains;² but under the codes adopted in some of the states, by which all actions are prosecuted in the name of the party in interest, the mortgage would be enforced in the purchaser's own name.³

But the mere possession by a third person of a mortgage not assigned, and a note not indorsed by the mortgagee, is not sufficient evidence of his ownership of them to enable him to sustain an action upon them. He must allege and prove his ownership by other evidence.⁴

Where an assignment by a transfer of the note enables the assignee to foreclose the mortgage in his own name, the assignment is in effect not merely an equitable, but a legal assignment.⁵ In

¹ *Nelson v. Ferris*, 30 Mich. 497.

² *Young v. Miller*, 6 Gray (Mass.), 153; *Bryant v. Damon*, 1b. 564; *Partridge v. Partridge*, 38 Pa. St. 78; *Crane v. March*, 4 Pick. (Mass.) 131; *Vose v. Handy*, 2 Greenl. (Me.) 322; *Dimon v. Dimon*, 5 Halst. (N. J.) 156.

³ *Sangster v. Love*, 11 Iowa, 580; *Rankin v. Major*, 9 Iowa, 297; *Allen v. Pancoast*, *Spencer* (N. J.) 68; *Kinna v. Smith*, 2 Green (N. J.) Ch. 14; *Kamena v. Huelbig*, 23 N. J. Eq. 78. *Nixon's Dig.* p. 613; *Mulford v. Peterson*, 35 N. J. L. 127; *Southerin v. Mendum*, 5 N. H. 420; *Crow v. Vance*, 4 Iowa, 434; *Paine v. French*, 4 Ohio, 320; *Williams v. Morancy*, 3 La. Ann. 227; *Clearwater v. Rose*, 1 Blackf. (Ind.)

138; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Green v. Hart*, 1 Johns. (N. Y.) 580; *Austin v. Burbank*, 2 Day (Conn.), 474; *Gower v. Howe*, 20 Ind. 396.

In VIRGINIA it is provided by statute that the assignee of any "bond, note, or writing, not negotiable," may assert his equitable title in a court of law, even in his own name. Code, 1873, c. 141, § 17; and see *Garland v. Richeson*, 4 Rand. (Va.) 266; *Clarksons v. Doddridge*, 14 Gratt. (Va.) 44.

⁴ *Andrews v. Powers*, 35 Wis. 644, and cases cited.

⁵ *Southerin v. Mendum*, 5 N. H. 420; *Rigney v. Lovejoy*, 13 N. H. 247.

such case, upon the death of the mortgagee, no beneficial interest in the estate passes to his administrator.¹

When it plainly appears by the pleadings in an action to foreclose that the debt was assigned, it is not necessary to aver that the mortgage was assigned. It is a conclusion of law that the mortgage passed with the debt as an incident to it.²

814. After such assignment the mortgagee cannot discharge the mortgage. — After an assignment of the mortgage note, if negotiable, to an innocent party, before due, and for a good consideration, the mortgagee cannot enter of record a satisfaction of the mortgage, although the note was given without any consideration; and satisfaction so entered will be vacated by a court of equity.³ The holder of the note is entitled to the protection accorded to the holder of commercial paper. He may recover the full amount due on it, and is not limited, in an action to foreclose the mortgage, to the amount he actually paid for the securities with interest.⁴

He takes it free from any existing equities between the mortgagor and mortgagee.⁵ He holds the mortgage by the same title that he holds the notes, and subject to no defence that would not be good against them.⁶ The assignment by express terms may be made subject to all existing equities, as where it contained a clause declaring it "subject, however, to all the rights of the said mortgagor in and to the same."⁷

A mortgagee who discharges a mortgage of record after having assigned it, the discharge being effectual because the assignment has not been recorded, is liable to the holder of the mortgage for the amount secured by it, whether his intention in discharging it was fraudulent or not.⁸

815. A bond for a conveyance of real estate when assigned as security for a debt is in the nature of a mortgage. The as-

¹ Crosby v. Brownson, 2 Day (Conn.), 425; Dudley v. Cadwell, 19 Conn. 218. Hichens, 11 Wis. 353; Fisher v. Otis, 3 Chand. (Wis.) 83.

² Kurtz v. Sponable, 6 Kans. 395.

⁶ Martineau v. McCollum, 4 Chand.

³ Gordon v. Mulhare, 13 Wis. 22; (Wis.) 153; Cornell v. Hichens, 11 Wis. 353. McCormick v. Digby, 8 Blackf. (Ind.) 99.

⁴ Bange v. Flint, 25 Wis. 544.

⁷ Fisher v. Otis, 3 Chand. (Wis.) 83.

⁵ Crosby v. Roub, 16 Wis. 616; Andrews v. Hart, 17 Wis. 297; Cornell v. Y., 132.

⁸ Ferris v. Hendrickson, 1 Edw. Ch. (N.

signee does not acquire by the assignment an absolute and unconditional right to the benefit of the agreement; but he may foreclose the interest of the assignor under the bond, and a sale of such interest vests in the purchaser all the interest which the assignor had by means of it.¹

816. A power of attorney to one authorizing him to enforce the payment of a mortgage which is delivered to him without assignment, and of a note also delivered without indorsement, operates as a good equitable assignment, and the mortgagee cannot afterwards make a valid discharge of the mortgage.²

817. Assignment of debt without the mortgage.—If the note or other debt secured by the mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity goes with the debt, unless there be an agreement to the contrary.³ The mortgage title, if it does not

¹ *Wilson v. Fatout*, 42 Ind. 52.

² *Cutler v. Haven*, 8 Pick. (Mass.) 490.

³ CONNECTICUT: *Lawrence v. Knap*, 1 Root, 248.

MASSACHUSETTS: *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

VERMONT: *Keyes v. Wood*, 21 Vt. 331; *Langdon v. Keith*, 9 Vt. 299; *Pratt v. Bank of Bennington*, 10 Vt. 293.

NEW YORK: *Neilson v. Blight*, 1 Johns. (N. Y.) Cas. 205; *Green v. Hart*, 1 Johns. (N. Y.) 590; *Evertson v. Booth*, 19 Johns. (N. Y.) 491; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Barclay v. Blodget*, 5 Cow. (N. Y.) 202; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Parmelee v. Dann*, 23 Barb. (N. Y.) 461.

NEW HAMPSHIRE: *Southerin v. Mendum*, 5 N. H. 420; *Downer v. Burton*, 26 N. H. 338; *Blake v. Williams*, 36 N. H. 39; *Rigney v. Lovejoy*, 13 N. H. 247; *Smith v. Moore*, 11 N. H. 55; *Page v. Pierce*, 26 N. H. 317.

MISSISSIPPI: *Holmes v. McGinty*, 44 Miss. 94; *Dick v. Mawry*, 17 Miss. 448.

WISCONSIN: *Croft v. Bunster*, 9 Wis. 503; *Rice v. Cribb*, 12 Wis. 179; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Blunt v.*

Walker, 11 Wis. 334; *Andrews v. Hart*, 17 Wis. 297; *Martineau v. McCollum*, 4 Chand. (Wis.) 153.

INDIANA: *Burton v. Baxter*, 7 Blackf. (Ind.) 297; *Blair v. Bass*, 4 Ib. 539; *French v. Turner*, 15 Ind. 59.

KENTUCKY: *Miles v. Gray*, 4 B. Mon. 417; *Burdett v. Clay*, 8 Ib. 287.

ALABAMA: *Emanuel v. Hunt*, 2 Ala. 190; *Cullum v. Erwin*, 4 Ala. 452; *Graham v. Newman*, 21 Ala. 497; *Center v. P. & M. Bank*, 22 Ala. 743.

CALIFORNIA: *Ord v. McKee*, 5 Cal. 515; *Bennett v. Solomon*, 6 Cal. 134.

IOWA: *Bank of Indiana v. Anderson*, 14 Iowa, 544; *Crow v. Vance*, 4 Iowa, 434.

ILLINOIS: *Pardee v. Lindley*, 31 Ill. 174; *Mapps v. Sharpe*, 32 Ill. 13; *Lucas v. Harris*, 20 Ill. 165; *Vansant v. Allmon*, 23 Ill. 30.

PENNSYLVANIA: *Partridge v. Partridge*, 38 Pa. St. 78; *Danley v. Hays*, 17 Serg. & R. (Pa.) 400.

LOUISIANA: *Scott v. Turner*, 15 La. Ann. 346.

MICHIGAN: *Martin v. McReynolds*, 6 Mich. 70.

MISSOURI: *Laberge v. Chauvin*, 2 Mo.

legally pass to the assignee by such assignment, as some authorities hold, remains in the mortgagee as trustee for the holder of the debt, even though the latter did not know at the time of the transfer of the existence of the security. Whenever it comes to his knowledge he may affirm the trust and enforce the security. If the mortgagor after notice of such an assignment pay the debt to the mortgagee, he does it in his own wrong and must suffer the loss.

Such an assignment has generally, however, no effect upon the legal estate. It is true, as has already been noticed at length in the first chapter, that by legislative enactment, or by judicial construction in several states, the legal character of a mortgage at common law no longer exists; but generally the distinction is kept up, and "great convenience, if not safety," is found in it.¹ "The true character of a mortgage," says Chief Justice Shaw,² "is the pledge of real estate to secure the payment of money, or the performance of some other obligation. Its object, from its creation to its redemption or foreclosure, is that of a pledge for such debt or duty. It may, in many aspects, be called a real lien, a chattel interest, a chose in action, and *quasi* personal. But as it binds land, and may lay the foundation of a title to real estate, it assumes in many respects the character of a land title. It is so in its origin, by deed; in the mode of giving it notoriety, by registration; in its transfer, by deed of assignment; its discharge, by deed of release; and in the mortgagee's remedy, by writ of entry against the mortgagor, or other person in possession under him."

But whatever may be the equitable interest of an assignee having only an equitable assignment of a mortgage, as for instance by the delivery of the mortgage note or bond without a formal assignment of the mortgage, he has no legal interest, and cannot sue in *scire facias*,³ or maintain a writ of ejectment,⁴ or a writ of entry,⁵ in his own name. Such an assignee at most is only a

179; Chappell v. Allen, 38 Mo. 213; Potter v. Stevens, 40 Mo. 229.

NORTH CAROLINA: Hyman v. Devereux, 63 N. C. 624.

OHIO: Paine v. French, 4 Ohio, 318.

TEXAS: Perkins v. Sterne, 23 Tex. 561.

SOUTH CAROLINA: Muller v. Wadlington, 5 S. C. 342, and cases cited.

MAINE: Vose v. Handy, 2 Greenl. 322.

¹ Chief Justice Shaw, in Young v. Miller,

6 Gray (Mass.), 152.

² See Young v. Miller, *supra*.

³ Partridge v. Partridge, 38 Pa. St. 78.

⁴ Cottrell v. Adams, 2 Biss. 351; Edgerton v. Young, 43 Ill. 464.

⁵ Young v. Miller, 6 Gray (Mass.), 152;

cestui que trust having an equitable interest in the real estate, the legal title to which is held by another, either as an actual or resulting trust. He has no legal interest in the land, and can maintain no action at law in respect to it. His rights are equitable, and must be pursued in a court of equity. He may, however, use the name of the legal holder of the mortgage to enforce the legal rights that appertain to the mortgage.¹

818. Legal interest of the mortgagee after assignment of the debt. — As has already been stated the mere transfer of the debt does not at common law carry with it the mortgage security so far as to vest the legal interest in the purchaser; but only gives him an equitable interest, which must be enforced in the name of the person who still holds the legal title. On the other hand, if the mortgage debt has been paid, a mere naked mortgage title does not avail the mortgagee so as to enable him to maintain an action upon the mortgage. He has a mere naked seisin without any beneficial interest. And if the debt has not been paid, but has been transferred to another person, the beneficial interest no longer exists in the mortgagee, but in the assignee of the debt, who must however enforce his security in the name of the mortgagee. A mortgage is available as a security only, as it is connected in some way with the debt or duty which it secures. To one who has not the debt, it is of no value as property, as it could at most be only resorted to as a trust for the benefit of the holder of the note.²

When the debt and the legal title to the mortgaged estate are separated in this way, if the holder of the latter will not voluntarily use this title for the benefit of the person entitled to the use of it, it may be necessary to resort to a bill in equity to charge the party who has the legal title as a trustee for the holder of the debt;³ whereupon he will be compelled either to maintain a suit at law, or to foreclose for the benefit of the assignee, or to assign the mortgage to the holder of the debt.⁴ Courts of law will enforce this equitable principle so far as they are able.

Bryant v. Damon, Ib. 564; Warden v. Adams, 15 Mass. 232; Dwinel v. Perley, 32 Me. 197; Gould v. Newman, 6 Mass. 239.

¹ Graham v. Newman, 21 Ala. 497.

² Sanger v. Baneroft, 12 Gray (Mass.), 365, per Dewey, J.

³ Per Dewey, J., in Wolcott v. Winchester, 15 Gray (Mass.), 461.

⁴ Crane v. March, 4 Pick. (Mass.) 131.

819. The law implies an intention in such case that the mortgagee shall hold the mortgage title in trust. — If the only note or bond secured by a mortgage be transferred without a formal assignment of the mortgage, and there is nothing to indicate an intention of the parties that the mortgage security is not to go with it, the law implies the intention that the mortgagee shall hold the title in trust for the indorsee, for except as a security to him the barren fee in the mortgagee is useless.¹

But the question has been raised whether in case one of two notes be indorsed without any expression of intent, any resulting trust will be implied in favor of the indorsee, as the mortgagee still has a beneficial interest in the mortgage as security for his remaining note.²

820. As to whom an assignment by transfer of the debt only is effectual. — The mortgage passes as an incident to the note. No assignment of the mortgage is necessary as between the parties, or as against the mortgagor or others having actual notice of the transfer of the notes. The mortgagor is bound to take notice of such an assignment upon the discharge of his debt, because proper diligence on his part demands that he should require the production of the notes before paying.³

But if the mortgagee, while the notes are in the hands of the assignee, cancels the mortgage on receiving payment from the mortgagor, who then makes conveyance or a new mortgage to another person, who acts in good faith and in ignorance of the fact that the original mortgage had not been paid to the proper party, such purchaser or subsequent mortgagee has the better title.⁴ Such subsequent purchaser or mortgagee is not bound to take notice of an assignment by transfer of the notes alone. The assignee of the notes can easily protect himself by requiring an assignment of the mortgage and recording it, and thus give notice of his rights; and if he omits to do this, he should be the party to suffer for the negligence.

¹ *Young v. Miller*, 6 Gray (Mass.), 152; *Crane v. March*, 4 Pick. (Mass.) 131, 136; *Wolcott v. Winchester*, 15 Gray (Mass.), 461, 465.

² Per Shaw, C. J., in *Young v. Miller*, 6 Gray (Mass.), 152; per Dewey, Justice, in *Wolcott v. Winchester*, *supra*.

³ *Swan v. Yapple*, 35 Iowa, 248; *Bremer Co. Bank v. Eastman*, 34 Iowa, 392; *Crow v. Vance*, 4 Iowa, 434; *Bank of the State of Ind. v. Anderson*, 14 Iowa, 544; *Pope v. Jacobus*, 10 Iowa, 262.

⁴ *Bank of the State of Ind. v. Anderson*, 14 Iowa, 544.

In a recent case in Illinois,¹ Mr. Justice Lawrence, delivering the opinion of the court, clearly illustrates some phases of this subject. "If a purchaser finds upon record a mortgage, and a subsequent deed from the mortgagee to the mortgagor, it is probable that he would be protected under our registry laws against the claim of an assignee of the note secured by the mortgage in the absence of notice of such assignment. Although the assignment of a note secured by mortgage carries with it the equitable interest in the mortgage, it carries only an equitable interest; and if the assignee desires to protect himself against all peril from a release of the legal title by the mortgagee to the mortgagor, and a subsequent conveyance by the mortgagor to a third person without notice, it would probably be held, that the assignee of the note should also take and record a deed from the mortgagee for the mortgaged premises. But admitting that such would be the rule when the mortgagee reconveys to the mortgagor, it by no means follows that the same rule should be applied to cases where the mortgagor conveys to the mortgagee. The conveyance in the former case can be understood only as manifesting an intention on the part of the mortgagee to release the lien of the mortgage. It can be made for no other purpose. A mortgagor, procuring a release of a lien created by himself against his own land, would be presumed to have procured the release with the express intent to extinguish the lien, and third persons would be authorized to act upon that presumption. But a mortgagee may procure a conveyance from the mortgagor without intending to merge the lien of his mortgage. It may be of great importance to him to be permitted, for the protection of his title, to keep his mortgage alive, and to assert it in a court of equity, if the necessity shall arise." In this case it was held that where the mortgagee assigned a note secured by mortgage, and subsequently procured a conveyance in fee of the premises from the mortgagor to himself, and the land was then levied upon and sold as the property of the mortgagee to a third party, the only interest acquired by the purchaser was the equity of redemption.²

821. Assignment of part of the mortgage debt. — There is no doubt that where a mortgage is conditioned to secure the

¹ *Edgerton v. Young*, 43 Ill. 464.

Campbell v. Carter, 14 Ill. 289; *Jarvis v.*

² *Edgerton v. Young*, 43 Ill. 464; *Frink*, 14 Ill. 398.

payment of several notes, the mortgagee may, if he choose, assign the whole mortgage interest as security for a part of the notes transferred at the same time, leaving no security in the land for a subsequent assignee of the other notes.¹ But if the mortgagee in terms assign only such part of the mortgage security as corresponds to the notes transferred, then the holder of the remaining notes is entitled to the remainder of the security.² An assignment of a part of the mortgage notes, in the absence of any contract to the contrary, is held to operate as an assignment of a *pro rata* interest in the mortgage.³ The assignee of the mortgage and part of the notes holds the security in trust for the benefit *pro rata* of one who had previously taken the other notes.⁴

The same principle applies when the debt secured is represented by bonds of a railroad company or other corporation. The security attaches to the bonds in whosoever hands they may be. Moreover, an interest coupon detached from the bond and in the hands of another person is still entitled to a proportionate share of the mortgaged security.⁵

If a mortgage for \$2,750 be assigned "to the extent of \$1,500," being the amount of three of the mortgage notes, the mortgagee holding two other notes under an agreement that his security should not be impaired as to them, the assignee becomes a tenant in common with the mortgagee, each being owner under the mortgage of such part of the estate as the debt due to each bears to the whole mortgage debt. The assignee in such case cannot foreclose the entire mortgage, but only to the extent of his interest.⁶

822. When assignee of one note has priority. — A mortgagee holding two or more notes secured by one mortgage can transfer the mortgage and one note, so as to give that note priority in satisfaction out of the mortgaged property;⁷ and an in-

¹ *Warden v. Adams*, 15 Mass. 233; *Langdon v. Keith*, 9 Vt. 300.

² *Wright v. Parker*, 2 Aik. (Vt.) 212.

³ *Keyes v. Wood*, 21 Vt. 331; *Cooper v. Ulmann*, Walk. (Mich.) Ch. 251; *Donley v. Hays*, 17 S. & R. (Pa.) 400.

⁴ *Belding v. Munly*, 21 Vt. 550; *Moore v. Ware*, 38 Me. 496.

⁵ *Miller v. Rutland, &c. R. Co.* 40 Vt. 39.

⁶ *Lane v. Davis*, 14 Allen (Mass.), 225.

⁷ *Wright v. Parker*, 2 Aiken, 212; *Cooper v. Ulmann*, Walk. (Mich.) Ch. 251; *Bank of England v. Tarleton*, 28 Miss. 173; *Walker v. Dement*, 42 Ill. 272.

In *Langdon v. Keith*, 9 Vt. 299, Mr. Chancellor Collamer adopts the views and language of the court in *Wright v. Parker*,

dorsement of one note, with an assignment of the mortgage, is sufficient, in the absence of all circumstances indicating a contrary intention, to give to the holder of such note priority.

The mortgagee may by agreement fix the rights of the holders of the several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer.¹ An assignment of the mortgage with one note may imply a priority of payment over any notes retained and owned by the mortgagee, and any subsequent indorsement of the other notes would not then destroy the priority of the note transferred with the mortgage.²

But when there is no such implication of an intention to give priority to the note assigned, the indorsement and delivery of it carries with it a *pro rata* portion of the security and nothing more. This is the generally received doctrine.³

When successive assignments of several notes or bonds secured by a mortgage are made without an assignment of mortgage, the rule, "*Qui prior in tempore, potior est in jure*," has no application. This is applicable when there are successive charges upon the same property; but as between several obligations secured by the same mortgage, much difficulty might result from the rule on account of the uncertainty and fraud that might attend an inquiry into the times of the several assignments. And yet in several states the rule has been adopted that the note first falling due has

supra. "If the mortgagee choose to assign all his interest in the mortgaged premises, to secure but a part of the notes therein, assigned by him, he has a right to do so, and in such case, no interest in the premises could remain in him."

¹ *Grattan v. Wiggins*, 23 Cal. 16, 30, and cases cited; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. (N. Y.) 410.

The assignee of one note, who also has an assignment of the mortgage, may perhaps stand upon another principle of law, namely, that when two or more have equal claims in equity, and one has a legal title, the legal title shall prevail. *Eastman v. Foster*, 8 Met. (Mass.) 19, per Chief Justice Shaw.

According to other authorities, however, the assignment of the mortgage with one

note does not necessarily give that note priority, but operates only as an assignment of the mortgage *pro tanto*. *Stevenson v. Black*, Saxt. (N. J.) 338; *Page v. Pierce*, 26 N. H. 317; *Betz v. Heebner*, 1 Penn. 280; *Ewing v. Arthur*, 1 Humph. (Tenn.) 537.

² *Noyes v. White*, 9 Minn. 640; see, however, *Henderson v. Herrod*, 18 Miss. 631.

³ *Phelan v. Olney*, 6 Cal. 478; *Belding v. Manly*, 21 Vt. 550; *Keyes v. Wood*, 21 Vt. 331; *Page v. Pierce*, 26 N. H. 317; *Johnson v. Brown*, 31 N. H. 405; *Moore v. Ware*, 38 Me. 496; *Stevenson v. Black*, (Saxt.) 1 N. J. Eq. 338; *Swartz v. Leist*, 13 Ohio St. 419; *Herring v. Woodhull*, 29 Ill. 92; *Donley v. Hays*, 17 S. & R. (Pa.) 400; *Hancock's Appeal*, 34 Pa. St. 155.

precedence in the application of the security, and is to be first satisfied.¹

In the beginning, and as between the original parties, the mortgage stands as a security for all the mortgage notes equally. If the mortgagee assigns one of the notes, retaining the others together with the mortgage, the mortgage will stand as security for all the notes *pro rata*; and this is the case, without reference to the time they respectively become due.² If there be two mortgage notes, and upon the assignment of the mortgage one of them is indorsed without recourse, and the other is indorsed in blank, by the mortgagee upon foreclosure, the notes are entitled to the benefit of the mortgage security *pro rata*, and a decree placing the deficiency altogether upon the indorsed note, and requiring payment of it from the mortgagee, is erroneous.³

An assignment of a mortgage so far as it secures the payment of the second note named therein, together with the second note with a covenant of warranty against all persons claiming under the assignor, transfers the mortgage as security, first for the payment of the note assigned with it, and then in trust to secure the payment of the other note; and if such assignment is recorded it charges the estate in the hands of subsequent purchasers of the mortgage with such trust.⁴

6. *Construction and Effect of Assignments.*

823. Law of place. — A mortgage of course takes effect by virtue of the law of the place where the land is situated. But this rule does not extend to an equitable transfer of the mortgage and of the debt to which it is incident. An assignment of the mortgage is a new contract and passes a chattel interest, and the rights of the parties are governed by the law of the place where it is executed.⁵

¹ *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447; *Wood v. Trask*, 7 Wis. 566; *Grapen-gether v. Fejervary*, 9 Iowa, 163; *Rankin v. Major*, Ib. 297; *Sangster v. Love*, 11 Iowa, 580; *Hinds v. Mooers*, Ib. 211; *Cullum v. Erwin*, 4 Ala. 452; *M'Vay v. Bloodgood*, 9 Port. (Ala.) 547.

² See *English v. Carney*, 25 Mich. 178.

³ *English v. Carney*, 25 Mich. 178.

⁴ *Bryant v. Damon*, 6 Gray (Mass), 564. See *Norton v. Stone*, 8 Paige (N. Y.), 222.

⁵ *Dundas v. Bowler*, 3 McLean, 397; *Hoyt v. Thompson*, 19 N. Y. 207; *Bank of England v. Tarleton*, 23 Miss. 173; *Murrell v. Jones*, 40 Miss. 565, 583.

824. An ordinary assignment passes nothing beyond the mortgage title.—The words of grant in an ordinary deed of assignment of a mortgage do not operate by way of covenant or estoppel beyond the description of the thing assigned; and they cannot have the effect to convey or extinguish any other right or interest the assignor has in the property, as for instance a right of entry for breach of a condition subsequent. Neither does an assignment in ordinary form without covenants of warranty estop the assignor to set up an after acquired title;¹ nor does it pass a title to a portion of the premises which the assignor has previously acquired by a purchase under a foreclosure of a prior mortgage of that portion.² By the foreclosure sale the assignor, who has become absolute owner of a part of the premises free from any right of redemption, no longer holds that as mortgagee. The assignment conveys a title in mortgage, and not an absolute title in fee. These are distinct titles. The assignment does not touch the title which the assignor holds absolutely.

Where one conveyed land upon the express condition that the grantee should within a certain time erect certain buildings on it, and took back a mortgage of it to secure the payment of part of the purchase money, and then by assignment in the usual form sold and conveyed "said mortgage deed, the real estate thereby conveyed, and the promissory note, debt, and claim thereby secured," it was held that only the mortgage title passed to the assignee of the mortgage, subject to be defeated by breach of the condition of the original deed.³ "The real estate thereby conveyed," said Mr. Justice Gray, "was not an absolute title in fee, but a title in mortgage, and, in this case, a title subject to be defeated by the mortgagors' breach of the condition subsequent in the deed to them. The words of grant in the assignment cannot operate by way of covenant or estoppel beyond the description of the thing granted and assigned."

Moreover, the assignment of a mortgage of premises upon which the mortgagee has a right of entry for a breach of a condition subsequent, as for instance a condition for the payment of

¹ *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554.

² *Durgin v. Busfield*, 114 Mass. 492. The words of the assignment were, "sell, assign, transfer, set over, and convey said

mortgage deed, the real estate thereby conveyed, and the promissory note, debt, and claim thereby secured."

³ *Merritt v. Harris*, 102 Mass. 326, and cases cited.

prior mortgages upon the property, does not convey or extinguish the right of entry,¹ although an absolute alienation in fee before an entry for the breach would extinguish the right or possibility of reverter;² for, as Coke expresses it,³ "Nothing in action, entry, or reentry can be granted over;" and the reason he gives for the rule is "for avoiding of maintenance, suppressing of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession."

In New York, however, it is held that one assigning a bond and mortgage impliedly warrants their validity, and is liable for a breach of such implied warranty.⁴

A warranty of the validity of a mortgage is a warranty, in effect, that the bond as well as the mortgage is valid; for if the bond be invalid, the mortgage which is dependent upon the debt is invalid also.⁵

825. But a mortgagor cannot set up an after acquired title as against his covenants of warranty.—A mortgagor who has bought land and given a mortgage for the purchase money containing covenants of warranty cannot set up a title adversely to his mortgage in the hands of an assignee, although he acquire the title under a sale for taxes assessed upon the land before he bought it. Such title enures instantly to the benefit of the assignee.⁶

826. When an equitable assignment carries a power of sale. In those states where a mortgage is regarded as merely a lien and not as an estate in the land, and an assignment of the note carries with it as an incident the mortgage, which may be enforced in the name of the assignee, an indorsement and delivery of the note without a formal assignment of the mortgage vests the power of sale in the assignee. The power passes from the mortgagee, and can no longer be executed by him.⁷ But in Illi-

¹ *Hancock v. Carlton*, 6 Gray (Mass.), 39; *Richardson v. Cambridge*, 2 Allen (Mass.), 118; *Merritt v. Harris*, 102 Mass. 326.

² *Rice v. Boston & Worcester R. Co.* 12 Allen (Mass.), 141, and cases cited.

³ Co. Litt. 214 *a*; and see Co. Litt. 369 *a*.

⁴ *Ross v. Terry*, 63 N. Y. 613.

⁵ *Ross v. Terry*, 63 N. Y. 613.

⁶ *Gardiner v. Gerrish*, 23 Me. 46.

⁷ *Olds v. Cummings*, 31 Ill. 188; *Pardee v. Lindley*, *Ib.* 174.

nois it is held that an assignment of the mortgage without an indorsement of the note, inasmuch as the mortgage is not assignable, either at common law or by statute, in that state, will not pass the power of sale to the assignee, but it will still remain in the mortgagee, who alone can exercise it.¹

827. Assignment as collateral security. — An assignment of a mortgage may in equity be shown to be in fact collateral security for a loan, though it be absolute in form. Such evidence does not vary or contradict the writing, but establishes a limitation inherent in the transaction, and a court of equity will restrict it accordingly.² When the mortgage secures a negotiable note, the assignee who has taken it as collateral security, by an absolute assignment in the usual form, though for only a small part of the amount secured by the mortgage, may himself assign it to another; and this second assignee, if he has taken it before it was due for full value, without notice of the limited interest of the assignor, may enforce it for the full amount. But if the debt secured be a bond or other non-negotiable instrument, the second assignee would in such case acquire only the right and interest of the first assignee:³ and the assignor who pledged the mortgage can redeem upon paying the amount of the loan for which it was pledged, in whosoever hands he may find it.⁴

If such assignee foreclose the mortgage and at the sale bids it in for a sum less than the amount of the debt which the assignment was made to secure, inasmuch as he holds the mortgage after satisfying his own claim as trustee for his assignor, he is not allowed to purchase the premises for his own benefit, but they are in his hands subject to be redeemed by his *cestui que trust*.⁵ The effect of the foreclosure in such case is simply to bar the equity of the mortgagor and his grantees in the land, and it has no operation upon the rights of the assignor and his assignee holding it as collateral security for an amount less than the mortgage debt. The assignee holds the mortgage only as security for the debt due him, and as trustee for his assignor for any surplus. The equi-

¹ Hamilton v. Lubukee, 51 Ill. 415.

² Pond v. Eddy, 113 Mass. 149.

³ Bush v. Lathrop, 22 N. Y. 535; United States v. Sturges, 1 Paine, 525.

⁴ Sweet v. Van Wyck, 3 Barb. (N. Y.) Ch. 647.

⁵ Hoyt v. Martense, 16 N. Y. 231; and see Slee v. Manhattan Co. 1 Paige (N. Y.), 48.

table rule, therefore, which forbids a trustee or person acting in a fiduciary capacity from speculating upon the subject of the trust, applies as well after the foreclosure and sale as before.

If a mortgagee in possession assign his mortgage as collateral security for a debt, this is an admission, which the mortgagor may avail himself of, that it is a subsisting security.¹

When a mortgage fraudulent in its inception, as against the mortgagor's creditors, is assigned to one who has knowledge of the fraud, he stands in no better situation to enforce it or to claim protection under it than a party to the original fraudulent transaction.² The law will lend him no aid whatever for either purpose. The burden, however, of proving that the assignee took the mortgage with notice, or that he is not a *bonâ fide* purchaser, is on the party who sets up the fraud.³

The title to a mortgage that was fraudulent in its inception as against the mortgagor's creditors becomes valid in the hands of one who has purchased it in good faith without notice of the fraud. The contrary of this was asserted in some of the earlier cases in this country, upon a distinction taken between a conveyance fraudulent as against creditors and one fraudulent against subsequent purchasers; the former being held absolutely void, and the latter voidable only. But this distinction is rejected by all the later authorities, and the conveyance in both cases held to be voidable only.⁴

828. Assignment induced by fraudulent representations. —

If the holder of a mortgage made by a third person induces another to take an assignment of it by representations as to the responsibility of the mortgagor and the value of the security, which are false in fact, though honestly made in the belief that they are true, and they are relied upon by the purchaser, they are in legal effect fraudulent;⁵ and the assignee may reclaim the consideration. He must have used, however, reasonable care in

¹ Borst v. Boyd, 3 Sandf. (N. Y.) Ch. 501; Hansard v. Hardy, 18 Ves. 455, 459.

² Danbury v. Robinson, 14 N. J. Eq. 213; Chamberlain v. Barnes, 26 Barb. (N. Y.) 160.

³ Marshall v. Billingsly, 7 Ind. 250; Farmers' Bank v. Douglass, 19 Miss. 469; Langdon v. Keith, 9 Vt. 299.

⁴ See Danbury v. Robinson, *supra*, where the earlier cases are cited and commented upon; and see Oriental Bank v. Haskins, 3 Met. (Mass.) 332.

⁵ Webster v. Bailey, 31 Mich. 36. See Goninan v. Stephenson, 24 Wis. 75; McCandless v. Engle, 51 Pa. St. 309.

the transaction, and diligence in discovering the facts afterwards. Something more than mere failure of consideration is requisite to entitle him to reclamation; ¹ either fraud in fact or in legal effect is necessary. ²

Although an assignment of a mortgage be made for the purpose of hindering, delaying, and defeating the assignor's creditors, if the assignee purchases it in good faith for value, without notice of the fraudulent intent of the assignor, or of circumstances which should have put him upon inquiry, his title cannot be impeached. As against him it does not avail to show that the debtor's assignment was fraudulent, unless it be also shown that the assignee participated in the fraudulent intent, or took it under such circumstances that he is chargeable with notice of the fraudulent intent on the part of the assignor. ³

829. An assignment passes all the securities. — In general, it may be said that an assignment of a mortgage is an assignment not only of the claim against the mortgagor, but as well of all the securities which the assignor holds against the mortgagor or others for the same debt. ⁴ It transfers any judgments that may have been obtained against indorsers or others. It passes, also, a mortgage given as collateral security to the mortgage debt assigned. ⁵

830. Whether the assignment carries a separate contract of guaranty. — The assignment of a mortgage does not carry with it a separate contract of guaranty of the payment of the mortgage debt, if that is strictly a personal engagement, and it is construed to be such when it is made to the holder of the mortgage by name, "his executors and administrators." The surety is not holden beyond the precise terms of his contract, and these words, in their plain and natural import, do not signify any intention to indemnify any one but the person to whom it was given. This person having put it out of his power to receive payment, the

¹ Butman v. Hussey, 30 Me. 263.

and see Gray v. Schenck, 4 N. Y. 460;

² Peabody v. Fenton, 3 Barb. (N. Y.)

Sprague v. Graham, 29 Me. 160.

Ch. 451.

⁴ Philips v. Bank of Lewistown, 18 Pa.

³ Tantum v. Green, 21 N. J. Eq. 364;

St. 394.

⁵ Philips v. Bank of Lewistown, *supra*.

purpose of the guaranty is accomplished and the guarantor is discharged.¹

831. There is an implied covenant in an assignment of a mortgage that the assignor will not receive the money on the instrument assigned, or that if he does he will pay it over to the assignee. This is the assignee's only security until he gives notice to the mortgagor. If the assignee omits to give such notice, and the mortgagor pays the mortgage to the assignor, the assignee's only remedy is upon such implied covenant against his assignor.²

On the other hand, after such assignment and notice to the mortgagor, the latter cannot, upon the subsequent insolvency of the mortgagee, purchase desperate claims against him, and tender them in payment of the debt, although the mortgage has been assigned only as collateral security. The debtor is bound to respect the rights of the holder of the debt, and knowing those rights he cannot, according to the rules of equity, or the principles of the common law, defeat them.³ This is a different question from that which arises when the rights and equities of the debtor exist at *the time of the assignment*.

There is no implied warranty of the solvency of the mortgagor, though there is such a warranty that the mortgage debt has not already been paid. But in case it has been paid the assignor is liable, not on the contract of assignment, but for the return of the money or thing received for the assignment.⁴

832. Usury.—If a mortgage be tainted with usury in its origin it is not invalidated by a subsequent usurious transfer, as

¹ *Smith v. Starr*, 4 Hun (N. Y.), 123.

² *Horstman v. Gerker*, 49 Pa. St. 282.

³ *Phillips v. Bank of Lewistown*, 18 Pa. St. 394, 403. Mr. Justice Lewis, delivering the opinion in this case, said: "The purchase of depreciated notes, after knowledge of such an assignment, is an act of bad faith, injurious to the rights of others. It is immaterial in what manner the knowledge of the transfer was acquired, so that it existed at the time of the purchase. It is not necessary that notice should be given by the party claiming the transfer, nor is it

required that it be in writing. In the case of *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311, the knowledge was derived from conversation with an agent of the assignor, who had no further interest in the demand. . . . In a case of this kind, all that is required is to lay before the jury such circumstances as justify them in drawing the inference that a knowledge of the assignee's rights existed at the time the measures were taken by the debtor for the purpose of defeating them."

⁴ *French v. Turner*, 15 Ind. 59.

for instance by being pledged as security for a usurious loan.¹ The assignee who has received the usury may be liable to his assignor for the usury taken; but the mortgage itself remains a valid security in his hands against the mortgagor and the mortgaged property.

833. Cancellation of assignment. — An assignment of a mortgage may be cancelled before it is recorded, and the note being indorsed back to the mortgagee he may maintain a writ of entry to foreclose the mortgage. The voluntary surrender of the only legal evidence by which the assignee could establish his claim may be regarded as in the nature of an estoppel. By cancelling the assignment the assignee voluntarily precludes himself from resorting to it.² Moreover, upon the retransfer of the note, the assignee has no equitable interest in the mortgage. If, therefore, the assignment is rendered useless and ineffectual to the assignee, the mortgage remains undischarged, and in full force, and the right of enforcing it must be vested in the mortgagee, who alone has any interest in it.

7. *Whether an Assignee takes subject to Equities.*

834. When the mortgage secures a negotiable note an assignee for value before due takes free from equities. — At common law, so far as a mortgage is merely a debt or security for a debt, it is a chose in action not negotiable, and therefore not assignable. So far as a mortgage is a conveyance of the legal estate, an assignment or conveyance of such estate may be made by a deed in usual form. A mortgage note, if negotiable in form, is of course assignable by indorsement, and the assignee takes the legal title to it.

But the debt being the principal thing imparts its character to the mortgage; and although the mortgage itself in the beginning is only assignable in equity, the legal rights and remedies upon the debt have become fixed upon this incident of the debt, and the equitable principles in regard to the mortgage have become naturalized in the common law system. When, therefore, the

¹ *Pearsall v. Kingsland*, 3 Edw. (N. Y.) Ch. 22; *Donnington v. Ch. 195*; *Warner v. Gouverneur*, 1 Barb. Meeker, 11 N. J. Eq. (3 Stock.) 362. (N. Y.) 36; and see *Lovett v. Dimond*, 4

² *Howe v. Wilder*, 11 Gray (Mass.), 267.

debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note by the commercial law, when assigned for value before maturity, passes to the assignee free of all equitable defences to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties.¹

835. In such case it does not matter that the consideration of the mortgage was wholly void, as where the consideration was the price of intoxicating liquors sold in violation of law. The negotiable note secured by the mortgage is valid in the hands of a *bonâ fide* indorsee for value without notice of the

¹ *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, Ib. 452; *Taylor v. Page*, 6 Allen (Mass.), 86; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Fannce*, 47 Me. 507; *Gould v. Marsh*, 4 Thomp. & C. (N. Y.) 128; 1 Hun, 566; *Dutton v. Ives*, 2 Mich. 515; *Cicotte v. Gagnier*, 5 Mich. 381; *Bloomer v. Henderson*, 8 Mich. 395; *Reeves v. Scully*, Walk. (Mich.) Ch. 248; *Croft v. Bunster*, 9 Wis. 510; *Cornell v. Hichens*, 11 Wis. 353; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Martineau v. McCollum*, 4 Ib. 153.

In NEW JERSEY it is provided by statute that mortgages shall be assignable at law, and that the assignee may sue in his own name; but that in such suit there shall be allowed all just set-offs and other defences against the assignor that would have been allowed in any action brought by him and existing before the defendant had notice of such assignment, and all payments made to the assignor in good faith before such notice. *Nixon's Dig.* p. 613.

In NEW YORK a bond is almost exclusively used in connection with a mortgage.

In the recent case of *Trustees of Union College v. Wheeler*, 61 N. Y. 88, Mr. Commissioner Dwight, referring to the cases cited in support of the rule above stated, said: "These cases have not yet become established law in this state. If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence."

Likewise in PENNSYLVANIA a bond instead of a note is almost always used. Mr. Justice Thompson said, in *Horstman v. Gerker*, 49 Pa. St. 282, that although a mortgage "may be assigned so as to permit the assignee to sue in his own name, yet it is subject to the same equities and rules that govern other non-negotiable instruments or claims."

No case involving the question of the admissibility of equities against the holder of a negotiable note secured by a mortgage has been noticed. See, also, *Twitchell v. McMurtrie*, 77 Pa. St. 383.

illegal consideration for which it was given.¹ The mortgage being assigned at the time when the note was indorsed, "we know of no principle or authority," says Mr. Justice Metcalf, "which makes the mortgage less valid than the note, in the plaintiff's hands."

A *bonâ fide* assignee for value of a mortgage of land may enforce it by foreclosure, although it was originally given as consideration for a transfer of the land fraudulent as to creditors, and such transfer has been adjudged void. The parties engaged in such fraud are estopped from setting it up.²

836. An exception to this general rule occurs when the assignment by its terms is made subject to the rights of the mortgagor. Thus, for instance, where a mortgage made partly to secure future advances was assigned by the mortgagee by a deed which purported to transfer all his right, title, and estate in the mortgaged premises, and the debt or note secured by the mortgage, subject, however, to all the rights of the mortgagor in and to the same, it was held that the assignee took no greater rights than the mortgagee himself had.³ This decision was placed upon the ground that this language was used in its ordinary and current meaning, and not in any special and technical sense, and that the natural construction of it is that it preserves all the equities of the mortgagor; and this construction not being inconsistent with the purpose and intention of the instrument, must prevail.

837. This doctrine applies when the note is indorsed and the mortgage is merely delivered. — If the mortgage notes be indorsed before maturity, and the mortgage delivered without any assignment of it at the time, the indorsee acquires an interest in the mortgage which he may enforce through the mortgagee as holding it for his benefit;⁴ and the owner of the equity of redemption cannot in a suit to redeem set-off against the indorsee claims he holds against the mortgagee acquired after such indorsement and delivery, and before the mortgage was assigned formally to the purchaser.⁵

¹ Taylor v. Page, 6 Allen (Mass.), 86.

² Smart v. Bement, 4 Abb. (N. Y.) App. Dec. 253.

³ Fisher v. Otis, 3 Chand. (Wis.) 83.

⁴ Green v. Hart, 1 Johns. (N. Y.) 580;

Jackson v. Blodget, 5 Cow. (N. Y.) 203; per Shaw, C. J., in Young v. Miller, 6 Gray (Mass.), 152.

⁵ Breen v. Seward, 11 Gray (Mass.), 118.

But an assignment of the mortgage without the debt transfers only a naked trust, and the mortgagor is still entitled to all the equities existing in his favor against the note, in the same manner as if the mortgage had not been assigned.¹ In such case, even if the mortgage was assigned, in part fulfilment of a promise to transfer both as a gift, and the note be not delivered, there is no transfer of the debt.²

838. Doctrine that the assignee takes the mortgage subject to existing equities. — There is, however, some conflict of authority upon the question whether the assignee of a mortgage which secures a negotiable note takes it subject to the equities existing between the mortgagor and mortgagee at the date of the assignment. Contrary to the general doctrine, it is contended that although the mortgage note is negotiable, the mortgage itself is only assignable in equity, and therefore the assignee having to resort to equity to enforce his rights is compelled to do equity towards the mortgagor, and allow him all the rights of defence he had against the mortgagee.³ Although the purchaser of a note before maturity takes it subject to no equities existing between the original parties, yet if it is secured by mortgage the non-assignable character of the security qualifies his rights and remedies upon the note, and makes it subject to the defences and equities to which it was liable in the hands of the assignor.

A mortgage distinct from the debt has no value in itself, and, if assigned, the assignee holds it in trust for the holder of the note or debt. The mortgage is not assignable either by statute or by the common law.⁴ The mortgage follows the notes only in equity, and is subject in the hands of the assignee to any defence which would avail against it in the hands of the mortgagee himself, although the assignee may have purchased the note in good faith, for a valuable consideration and before maturity.⁵ By the assignment of the notes the assignee obtained an equitable interest in the mortgage, which courts of equity, under certain cir-

¹ Pope v. Jacobus, 10 Iowa, 262.

² Wilson v. Carpenter, 17 Wis. 512.

³ Johnson v. Carpenter, 7 Minn. 176; Bouligny v. Fortier, 17 La. Ann. 121.

⁴ Medley v. Elliott, 62 Ill. 532.

⁵ Olds v. Cummings, 31 Ill. 188; White v. Sutherland, 64 Ill. 181; Fortier v. Darst,

31 Ill. 212; Sumner v. Waugh, 56 Ill.

531. The assignment of the notes carries the security of a deed made in trust to another person, and a court of equity will compel the trustee to sell for the benefit of the holder of the notes. Sargent v. Howe, 21 Ill. 148.

cumstances, will enforce, if it can be done without a violation of the equitable rights of others. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor.

“ We have not met with a single case where remedy has been sought in a court of chancery, upon a mortgage, by an assignee, in which every defence has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself, unless there has been an express statute authorizing the assignment of the mortgage itself. There are many cases in which the assignees have been protected against latent equities of third persons, whose rights, or even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid ; but he should not be required to inquire of the whole world to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as for instance a *cestui que trust*.”¹

This is the view taken by the courts in Illinois² and Ohio.³

839. The ground upon which the decisions rest is chiefly that while notes are made negotiable by commercial usage, by statute there is no such usage or provision as to mortgages, and therefore that the assignee of a mortgage takes it as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder.

This view was adopted in the Territory of Colorado in a case where the mortgagee had a pledge of personal property in addi-

¹ Chief Justice Caton, in *Olds v. Cummings*, 31 Ill. 188. In this case the defence of usury, in the mortgage note, was allowed to be set up against the assignee, taking the same before maturity.

² *Olds v. Cummings*, 31 Ill. 192 ; *Walker v. Dement*, 42 Ill. 273. In the former case Chief Justice Caton said : “ He who holds a note and also a mortgage holds in fact two instruments for the security of the debt ; first, the note with its personal security, which is commercial paper, and as such may be enforced in the courts of law,

with all the rights incident to such paper ; and the other, the mortgage with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defence which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity.”

³ *Baily v. Smith*, 14 Ohio St. 396.

tion to the note and mortgage, which were assigned before maturity to a *bonâ fide* purchaser. Previous to the assignment a part of the debt had been paid by a sale of a portion of the property pledged, but no credit was indorsed on the note. It was held that a mortgagor, in a suit by the assignee to foreclose the mortgage, was entitled to be credited with such payment.¹

840. Overruled by the Supreme Court of the United States.

This case was then removed by appeal to the Supreme Court of the United States, where the decree of the Supreme Court of the Territory of Colorado was reversed, and the generally accepted doctrine affirmed that the assignee for value before maturity of a negotiable note and a mortgage securing it is unaffected by any equities to which it would be subject in the hands of the mortgagee, and of which the assignee had no notice.² Mr. Justice Swayne answers the view of the case taken in the lower court, and in the decisions with which that is in accord. "The transfer of the note," he says, "carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

"All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There

¹ "Whether the proceedings be at law or in equity, the indebtedness is the principal thing, for both remedies are designed to enforce payment of the money. I concede that the remedy at law is upon the note alone, but it is equally plain that the suit in equity is founded upon the note and mortgage, and that each is essential to the right of recovery. . . . Where the indebtedness is indorsed by a separate instrument, a court of equity is as much bound to give effect to that instrument as to the mortgage. . . . The note is

the legal and unquestionable evidence of the indebtedness, as the mortgage is evidence of the lien, and each according to its office determines the rights of the parties. It is impossible to say that there is anything due upon the mortgage disconnected from the note, for the reason that the note alone determines the amount of the indebtedness." *Longan v. Carpenter*, 1 Col. 205. See dissenting opinion of Hallett, C. J.

² *Carpenter v. Longan*, 16 Wall. 271.

is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

841. When the note is overdue. — One who takes an assignment of a mortgage after the maturity of the promissory note secured by it is no longer entitled to this protection, but takes it subject to all defences which the mortgagor might have set up against the original mortgagee, although he has no notice of any such defence, and there is nothing upon the face of the papers to indicate it. The mortgage and note are subject to the same equities that the note would be subject to if not secured.¹

Moreover an assignment made to secure a preëxisting debt does not give the assignee the position of a purchaser for value, and entitle him to hold the mortgage free of the equities to which his assignor was subject; but in such case, although he takes the note before maturity, he takes it subject to such equities.²

842. A bond not being a negotiable instrument is subject when assigned to all equities existing between the original parties to it; and of course is subject to such equities when assigned with the mortgage, which is collateral to it. The rule that the assignee of a mortgage before maturity takes it free from existing equities applies only to such mortgages as are collateral to negotiable notes.³

¹ Fish v. French, 15 Gray (Mass.), 520; son, 11 N. J. Eq. (3 Stock.) 246; Dunn Howard v. Gresham, 27 Ga. 347. v. Seymour, Ib. 278; Andrews v. Torrey,

² Glidden v. Hunt, 24 Pick. (Mass.) 221; 14 N. J. Eq. 355; Trustees of Union College v. Wheeler, 61 N. Y. 88, 107; Ingraham v. Disborough, 47 N. Y. 421; Rice

³ Croft v. Bunster, 9 Wis. 503; Goulding v. Bunster, 9 Wis. 513; Musgrove v. Kennell, 23 N. J. Eq. 75; Losey v. Simp- v. Dewey, 54 Barb. (N. Y.) 455; Clute v. Robison, 2 Johns. (N. Y.) 595; Ni-

Therefore, any defence to which the bond and mortgage were subject in the hands of the mortgagee may still be made after they have been transferred to another for value. Fraud and duress in procuring the execution of the bond is a defence to the mortgage in the hands of an assignee.¹ The consideration may be impeached. Claims in set-off, which the mortgagor might interpose against the mortgagee, he may set up against the mortgage in the hands of the assignee. The assignee takes only the title that the mortgagee had. The bond is a mere chose in action, and the mortgage is a chose in action also. Neither instrument having any negotiable character, the mortgagor's rights in respect to the obligation are not changed in any way by a transfer of the mortgage.²

"A purchaser of a chose in action," says Lord Thurlow,³ "must always abide by the case of the person from whom he buys; that I take to be a universal rule." Aside from negotiable paper, which, under the commercial law has peculiar privileges, the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. His capacity to transfer to another is exactly measured by his own rights. Except as the codes of practice and special statutes in some states have changed the rule, an action by the assignee to enforce his rights must be in the name of the assignor. Therefore, "every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession."⁴

agara Bank v. Roosevelt, 9 Cow. (N. Y.) 409; *S. C. Hopk.* (N. Y.) Ch. 579; *Ellis v. Messervie*, 11 Paige (N. Y.), 467; *S. C. 5 Denio* (N. Y.), 640; *Pendleton v. Fay*, 2 Paige (N. Y.), 202; *James v. Morey*, 2 Cow. (N. Y.) 246; *Hartley v. Tatham*, 10 Bosw. (N. Y.) 273; *Reeves v. Scully*, Walk. (Mich.) 248; *Russell v. Waite*, Walk. (Mich.) 31; *Nichols v. Lee*, 10 Mich. 526; *Mott v. Clark*, 9 Pa. St. 399; *Pryor v. Wood*, 31 Pa. St. 142; *Twitchell v. McMurtrie*, 77 Pa. St. 383.

¹ *Martineau v. McCollum*, 4 Chand. (Wis.) 153.

² *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Ingraham v. Disborough*, 47 N. Y. 421; *Reeves v. Kimball*, 40 N. Y. 299; *Mason v. Lord*, 40 N. Y. 476; *Bush v. Lathrop*, 22 N. Y. 535; *Mickles v. Townsend*, 18 N. Y. 575; *Richards v. Warring*, 1 Keyes (N. Y.), 575; *Ely v. McNight*, 30 How. (N. Y.) Pr. 97; *Westfall v. Jones*, 23 Barb. (N. Y.) 9; *Jones v. Hardesty*, 10 G. & J. (Md.) 404, 420; *Cumb. Coal & Iron Co. v. Parish*, 42 Md. 598.

³ *Davies v. Austen*, 1 Ves. Jun. 247.

⁴ 2 Story Eq. Jur. § 1040.

But an assignee who takes a mortgage and bond with actual or constructive notice of the equities of third persons takes them subject to such equities.¹

843. Whether the rule is limited to equities between the original parties. — The rule that the assignee of a bond and mortgage, which are merely choses in action, takes them subject to existing equities is limited to such equities only as existed between the mortgagor and mortgagee, and is not extended to those existing between the mortgagee and third persons. “The assignee,” says Chancellor Kent,² “can always go to the debtor, and ascertain what claims he may have against the bond, or other chose in action, which he is about purchasing from the obligee; but he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason, the claim of the assignee without notice of a chose in action was preferred, in the late case of *Redfearn v. Ferrier*,³ to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case, that if it were not to be so, no assignments could ever be taken with safety.”

In a recent case before the Court of Appeals of New York,⁴ Mr. Commissioner Dwight reviewed the subject: “Is, then, the plaintiff in any better position than Mott, the mortgagee. It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more. In *Clute v. Robison*,⁵ the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee.⁶ The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law.⁷ It goes further than this, and declares

¹ *Hovey v. Hill*, 3 Laus. (N. Y.) 167; *Mathews v. Heyward*, 2 S. C. 239; *Godfrey v. Caldwell*, 2 Cal. 489.

² *Murray v. Lylburn*, 2 Johns. (N. Y.) Ch. 442.

³ 1 Dow. 50.

⁴ *Trustees of Union College v. Wheeler*, 61 N. Y. 88, 104.

⁵ 2 Johns. (N. Y.) 612.

⁶ 2 Vern. 692, 765; 1 Vesey, 122.

⁷ *Ingraham v. Disborough*, 47 N. Y. 421.

that the purchaser in chose in action must always abide the case of the person from whom he buys.¹ The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights.² Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract.³ The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush v. Lathrop*.⁴ A considerable number of authorities are cited by the plaintiff as tending to show that the assignee of a chose in action is only subject to the equities between the contractor (the assignor) and the debtor, and not to the so-called latent equities of third persons. Such cases as *James v. Morey*,⁵ *Bloomer v. Henderson*,⁶ *Mott v. Clark*,⁷ and others of the same class, were reviewed as to their principle or specifically in *Bush v. Lathrop*,⁸ and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, JJ., already considered, was thus adopted rather than that of Kent, Ch. J. The law of some of the other states undoubtedly coincides with the view of Kent, but, since the decision of *Bush v. Lathrop*, must be regarded as without authority here. . . .

“The plaintiff cites, to support his view, authorities to the effect that an assignee is a purchaser, and to the effect ‘that a mortgage is in form a conveyance of the land, and an assignment of it is another conveyance of the same land.’ These cases, which are very numerous in the law books, refer only to the position of a mortgagee or assignee in a court of law, and were decided in England, and in States of the Union, where more technical views of the rights of a mortgagee in a court of law prevail than in this state. They are of no force in a court of equity, in which the case at bar is assumed to be pending, for in such a tribunal a mortgage is but a chose in action and security for a debt.

“Reference is also made to a class of cases appearing in the law

¹ Per Lord Thurlow, in *Davies v. Austin*, 1 Vesey Jun. 247.

⁴ 22 N. Y. 535.

² *Beebe v. Bank of New York*, 1 Johns. (N. Y.) 552, per Spencer, J., and 549, per Tompkins, J.

⁵ 2 Cowen, 298, opinion of Sutherland, J.

⁶ 8 Mich. 402.

⁷ 9 Pa. St. 404.

³ *Ib.* 573.

⁸ 22 N. Y. 535.

reports of a number of the states, holding, in substance, that when a mortgage is given to secure a negotiable note, which is itself transferred before maturity for value, it is taken by the assignee free from all equity. It is agreed that these authorities tend to show that the mortgage partakes of the nature of the debt, in such a sense that only the direct equities between the debtor and the creditor can be set up as against the assignee. These cases have not yet become established law in this state.¹ If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence."

844. Equities in favor of third persons. — Whether the assignee of a mortgage debt not negotiable should be affected by latent equities existing against the assignor in favor of third persons, in the same manner that he is affected by such equities existing against him in favor of the mortgagor, is a question that has been frequently discussed in recent cases in the State of New York. In the case of *Bush v. Lathrop*,² Mr. Justice Denio, after examining numerous authorities, came to the conclusion that the supposed distinction is without foundation, and that the assignee takes the security subject to all the equities that third persons could enforce against the assignor, as well as subject to those existing between the parties to the instrument. In that case the holder of the mortgage and bond assigned them by an absolute and unconditional bond, as security for a debt for a much smaller sum than that due upon the mortgage, and his assignee transferred the mortgage for full value to a third person without notice of this fact. The rule above stated as to the equities of third persons was applied to the case, and it was held that the subsequent assignee took the security subject to the equity of the former holder of the mortgage, to redeem it upon payment of the amount of the debt for which he had pledged it.

This case, in the application of this rule to the facts presented, was overruled by the case of *Moore v. Metropolitan National Bank*;³

¹ *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Kenicott v. Supervisors*, *Ib.* 452; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 510. ² 22 N. Y. 535. ³ 55 N. Y. 41.

although the rule there stated as to the equities of third persons was not questioned. The latter case held that where the holder of a non-negotiable chose in action has conferred the apparent absolute ownership of it upon another by assignment, one who purchases from such assignee in good faith for value, relying upon the faith of such apparent ownership, obtains a valid title as against the first assignor, who is estopped from asserting a title in hostility to such apparent ownership. The decision is based altogether upon the doctrine of estoppel. The owner of the security, having conferred apparent ownership upon his assignee and apparent authority to convey, is estopped as against a *bonâ fide* purchaser to deny that ownership or that authority. Applying this rule of estoppel to the facts of the case presented in *Bush v. Lathrop*, the owner of the mortgage and bond having assigned them absolutely, and conferred upon his assignee apparent absolute authority over the securities, would be estopped from asserting his title to them against one who had purchased upon the faith of the assignee's apparent authority to sell.

The rule above stated as to the equities of third persons has been several times approved in recent cases before the Court of Appeals of New York; and the general doctrine is there well established that one who takes an assignment of a bond and mortgage takes them subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the latent equities in favor of third persons.¹

845. This doctrine was recently approved in *Greene v. Warnick*, by the Court of Appeals of New York.² It appeared that two mortgages for equal sums were executed at the same time upon the same real estate, to different persons, to secure the purchase money for the same. It was understood and agreed between the mortgagees at the time of the delivery of the mortgages, that they should be equal liens in all respects upon the premises. They were both recorded the same day, but one fifteen minutes before the other. The mortgage first recorded was as-

¹ *Greene v. Warnick*, 64 N. Y. 220; *Bush v. Lathrop*, "commends itself as a just exposition of the law, as well upon
Trustees of Union College v. Wheeler, 61 N. Y. 88; *Schafer v. Reilly*, 50 N. Y. 61; principle as upon authority."

Mr. Justice Allen, in the latter case, says ² 64 N. Y. 220, reversing S. C. 4 Hun, the rule as stated by Judge Denio, in 703.

signed to a *bonâ fide* purchaser for value without notice of the agreement. It was held that the assignee took, subject to the equities between the mortgagees, and could claim no priority of lien by reason that his mortgage was first recorded. The rule that an assignee of a bond and mortgage takes them not only subject to all the equities existing between the parties to the instrument, but to the equities which third persons could enforce against the assignor, was fully approved and adopted. The case differed from that of *Moore v. Metropolitan Bank*, in the fact that the doctrine of estoppel could not apply; for the holder of the mortgage last recorded had done nothing to induce the assignee to purchase the other mortgage, and had not by any act or omission misled him. Estoppel can only operate against the party whose act created it, and cannot affect the rights or equities of other persons.

846. No parol trust can be attached to a mortgage. — An agreement at the time of giving a mortgage between the parties to it and another to whom the mortgagor was indebted, that upon the payment of the mortgage it should be transferred to this creditor as security for the debt owing him, will not make the assignment to him, after the payment of the mortgage debt to the mortgagee, valid and effectual, so as to enable such assignee to foreclose the mortgage. Such an assignment is simply an attempt to tack or graft upon a mortgage duly executed under the hand and seal of the mortgagor a parol mortgage for a further sum.¹

847. The assignee not affected by equities arising after the assignment. — Under the rule that the assignee of a mortgage takes it subject to the equities and defences existing between the original parties at the time of the assignment, all equities and defences arising between them subsequent to the assignment, and which had no existence, and were simply possibilities at the time of the assignment, are excluded. Even a fraud committed by the assignor after the assignment cannot affect the rights of the assignee.²

¹ *Hubbell v. Blakeslee*, 8 Hun (N. Y.), 603; and see *Stoddard v. Hart*, 23 N. Y. 556; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) Ch. 293. *Cornish v. Bryan*, 2 Stockt. (N. J.) 146; *Coster v. Griswold*, 4 Edw. (N. Y.) Ch. 374; *Murray v. Lylburn*, 2 Johns. (N. Y.) Ch. 442.

² *Bush v. Cushman*, 27 N. J. Eq. 131;

CHAPTER XX.

MERGER AND SUBROGATION.

PART I.

MERGER.

848. Merger at law and in equity.—In law a merger always takes place when a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The lesser estate is annihilated or merged in the greater. But “upon this subject,” says Sir William Grant,¹ “a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it when at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united.”² This intention is a question of fact, and is to be tried and determined in the same manner as are other issues. It comes in to repel the *primâ facie* presumption of merger which arises from the union of the legal and equitable estates in the same person at the same time. His intention is generally determined by his interest, though all the attending circumstances are to be considered.³

¹ Forbes v. Moffatt, 18 Ves. 384.

² In England, since Nov. 1, 1875, no merger takes place by operation of law only, of any estate, the beneficial interest in which would not be deemed to be merged in equity. Sup. Ct. of Judicature, Act 1873, c. 66, § 25; Act 1874, c. 83, § 2.

³ St. Paul v. Viscount Dudley and Ward, 15 Ves. 167, 173; Gibson v. Crehore, 3 Pick. (Mass.) 475; Hunt v. Hunt, 14 Ib. 374; Tuttle v. Brown, Ib. 514; Loud v. Lanc, 8 Met. (Mass.) 517; Grover v.

Thatcher, 4 Gray (Mass.), 526; Evans v. Kimball, 1 Allen (Mass.), 240; Wallace v. Blair, 1 Grant (Pa.) Cas. 75; Duncan v. Drury, 9 Pa. St. 332; Marshall v. Wood, 5 Vt. 254; Walker v. Baxter, 26 Vt. 710; Myers v. Brownell, 1 D. Chip. (Vt.) 448; Slocum v. Catlin, 22 Vt. 137; Bullard v. Leach, 27 Vt. 491; Downer v. Fox, 20 Vt. 388; Robinson v. Leavitt, 7 N. H. 73; Bailey v. Willard, 8 N. H. 429; Hutchins v. Carleton, 19 N. H. 489; Weld v. Sabin, 20 N. H. 533; Johnson v. Elliott, 26 N. H. 69; Heath v. West, 26 N. H.

It is a general rule that when the legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct; or if there be an intervening right between the mortgage and the equity, there is no merger.¹ Thus, where the purchaser of the equity of redemption of premises already subject to a mortgage made a second mortgage, and while this was outstanding, took an assignment of the first mortgage, which he afterwards assigned to a third person, it was held that the first mortgage was not extinguished, but that the second mortgage outstanding prevented a merger.²

To effect a merger at law, the right previously held, and the right subsequently acquired, must coalesce in the same person and in the same right, without any other right intervening.³ "In fact," says Chief Justice Bellows of New Hampshire, in a recent case,⁴ "the doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon

191; *Bell v. Woodward*, 34 N. H. 90; *Drew v. Rust*, 36 N. H. 335; *Wilson v. Kimball*, 27 N. H. 300; *Moore v. Beasom*, 44 N. H. 215; *Hinds v. Ballou*, 44 N. H. 620; *Stantons v. Thompson*, 49 N. H. 272; *Hinchman v. Emans*, 1 N. J. Eq. (Saxt.) 100; *Van Wagenen v. Brown*, 26 N. J. L. 196; *Den v. Vanness*, 10 N. J. L. (5 Halst.) 102; *Duncan v. Smith*, 31 N. J. L. 325; *Millspaugh v. McBride*, 7 Paige, N. Y. 509; *Skeel v. Spraker*, 8 Ib. 182; *White v. Knapp*, 8 Ib. 173; *Judd v. Seekins*, 62 N. Y. 266; *Spencer v. Ayrault*, 10 N. Y. 202; *Cliff v. White*, 12 N. Y. 519; *Bascom v. Smith*, 34 N. Y. 320; *Sheldon v. Edwards*, 35 (N. Y.) 279; *Day v. Mooney*, 4 Hun (N. Y.), 134; *Angel v. Boner*, 38 Barb. (N. Y.) 425; *Vanderkemp v. Shelton*, 11 Paige (N. Y.), 28; *James v. Johnson*, 6 Johns. (N. Y.) Ch. 423; *Starr v. Ellis*, Ib. 393; *Gardner v. Astor*, 3 Ib. 53; *James v. Morey*, 2 Cow. (N. Y.) 285; *McGIVEN v. Wheelock*, 7 Barb. (N. Y.) 29; *Champney v. Coope*, 34 Ib. 539; *Kellogg v. Ames*, 41 Ib. 218; *Loomer v. Wheelwright*, 3 Sandf. (N. Y.)

Ch. 157; *Hancock v. Hancock*, 22 N. Y. 568; *Given v. Marr*, 27 Me. 212; *Holden v. Pike*, 24 Me. 437; *Hatch v. Kimball*, 14 Me. 9; *Simonton v. Gray*, 34 Me. 50; *Hatch v. Kimball*, 16 Me. 146; *Baldwin v. Norton*, 2 Conn. 161; *Lockwood v. Sturdevant*, 6 Conn. 387; *Mallory v. Hitchcock*, 29 Conn. 127; *Bassett v. Mason*, 18 Conn. 131; *Edgerton v. Young*, 43 Ill. 464; *Lyon v. McIlvaine*, 24 Iowa, 9; *White v. Hampton*, 13 Iowa, 259; *Davis v. Pierce*, 10 Minn. 376; *Snyder v. Snyder*, 6 Mich. 470; *Carter v. Taylor*, 3 Head (Tenn.), 30; *Grellet v. Heilshorn*, 4 Nev. 526.

¹ *Hancock v. Hancock*, 22 N. Y. 568; *Hill v. Pixley*, 63 Barb. (N. Y.) 200; *Loud v. Lane*, 8 Met. (Mass.) 517; *Grellet v. Heilshorn*, 4 Nev. 526; *Lyon v. McIlvaine*, 24 Iowa, 9; *Wilhelmi v. Leonard*, 13 Ib. 330; *Warren v. Warren*, 30 Vt. 530.

² *Evans v. Kimball*, 1 Allen, Mass. 240.

³ *Hunt v. Hunt*, 14 Pick. (Mass.) 384, per Shaw, C. J.; *Lockwood v. Sturdevant*, 6 Conn. 387, per Hosmer, C. J.

⁴ *Stantons v. Thompson*, 49 N. H. 272.

an estate of which he was seised in fee simple; but if there is an outstanding, intervening title, the foundation for the merger does not exist, and as matter of law it is so declared."

An intervening incumbrance of any kind is generally sufficient to prevent a merger of the mortgage with the equity of redemption, provided the incumbrance be not one which the owner has assumed to pay, or one against which he is estopped from defending, whether such incumbrance be an attachment,¹ a levy of execution,² another mortgage,³ or any other lien.

No merger occurs when the mortgagee purchases the equity of redemption at an execution sale, so long as the debtor's right to redeem from such sale continues.⁴

849. An assignment of a mortgage to one of two tenants in common of the equity of redemption does not discharge it, but he may foreclose it. His own interest in the equity does not prevent his holding under the higher title. The co-tenant is not prejudiced, for he may redeem by payment of his proportion of the debt.⁵

Where one who has purchased part of the premises subject to a mortgage takes an assignment of the mortgage, although it may operate as a merger in respect to the part of the premises bought by him, it will not have this operation in respect to the part not bought.⁶ Nor is there any merger when a mortgagee becomes a devisee of an undivided half of the mortgaged premises.⁷

When the owner of an equity of redemption by will or otherwise takes an undivided interest in the mortgage debt, as a tenant in common with others, no merger of his interest takes place. The owner of any part of a mortgage has the whole premises for his security. His mortgage cannot be extinguished as to any part or interest in the land, whether divided or undivided, without his assent. The fact that some one else has a legal interest or

¹ *Grover v. Thatcher*, 4 Gray (Mass.), 526.

² *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390.

³ *Bell v. Woodward*, 34 N. H. 90; *Dutton v. Ives*, 5 Mich. 515.

⁴ *Southworth v. Scofield*, 51 N. Y. 513.

⁵ *Barker v. Flood*, 103 Mass. 474.

⁶ *Wilhelmi v. Leonard*, 13 Iowa, 330; *King v. McVickar*, 3 Sandf. (N. Y.) Ch.

192; *Casey v. Buttolph*, 12 Barb. (N. Y.) 637; *Pike v. Goodnow*, 12 Allen (Mass.), 472.

⁷ *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

share in the security prevents the blending of the interests in such case.¹ And so, on the other hand, there is no merger when a mortgagee of the entire premises becomes a devisee of an undivided part of the equity of redemption. He is entitled to be protected by holding his entire mortgage against the entire premises.²

850. The assignment of a mortgage to the wife of the mortgagor operated at common law as a discharge of it. But under the statutes now in force in all or nearly all our states, authorizing married women to buy and sell real estate, such an assignment would not operate as a discharge.³

A husband may purchase and hold a mortgage given by his wife upon her property, in which he has also joined. It is not merged by an assignment to him. Much less is it satisfied in the hands of another person to whom it is assigned upon the payment of the consideration by the husband.⁴

851. Marriage of mortgagee and mortgagor.—Under the statutes in regard to the rights of married women in their separate property, now generally in force, the marriage of a single woman who holds a mortgage with the mortgagor does not extinguish the mortgage lien or the debt.⁵

Neither does the execution by the husband and wife after marriage, of a mortgage upon the same premises to a third person, discharge the lien of the wife's mortgage against her husband, if she uses no words of release to operate upon her mortgage, and it is apparent from the instrument that she joined merely to release her inchoate right of dower.⁶

852. In case the equitable estate has been in any way extinguished the doctrine of merger has no application. Thus, where a mortgagee allowed the mortgaged premises to be sold under a prior judgment, and failed to redeem within the time allowed, but afterwards obtained a conveyance of the premises

¹ *Clark v. Clark*, 56 N. H. 105

⁴ *Faulks v. Dimock*, 27 N. J. Eq. 65.

² *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

⁵ *Power v. Lester*, 23 N. Y. 527.

³ *Bean v. Boothby*, 57 Me. 295; *Bemis v. Call*, 10 Allen (Mass.), 512; *Model*

Lodging House Ass'n v. City of Boston, 114 Mass. 133.

⁶ *Power v. Lester*, 23 N. Y. 527; 17 How. Pr. 413; *Gillig v. Maass*, 28 N. Y.

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from the purchaser under execution sale, his mortgage title was wholly gone, and there was nothing to merge in the legal estate. Neither could his purchase have the effect in any way to revive his mortgage as a lien, and enable him to transfer it to another.¹

853. An assignee who has reassigned is estopped from claiming a merger. — After the owner of lands has taken an assignment of the mortgage to himself, and then assigned it to another as a valid security, he is estopped from insisting, as against the assignee or any one claiming under him, that it had merged and disappeared in the equity of redemption.² It is immaterial in such case that the remedy at law upon the note which accompanied the mortgage was barred; that does not affect the validity of the mortgage or the remedy upon it. It is immaterial, too, that the person who claims the benefits of a merger is a purchaser from the former owner by a deed made after the assignment of the mortgage by his grantor was recorded, for then the same record which informed him of the facts, which at common law would constitute a merger, also notified him of the assignment which created the estoppel.³ If he has purchased by deed of warranty he may have remedy upon the covenants; but he cannot resist the foreclosure of the mortgage.⁴

854. By selling the estate free from incumbrances, he may be estopped on the other hand, as against the purchaser at least, from saying that there was no merger.⁵

A mortgagee having purchased the equity of redemption while it was subject to a second mortgage, afterwards sold the land to a third person for a price sufficient to pay both mortgages, as well as the sum paid for the equity of redemption. Although his prior lien was not merged by his purchase, it was regarded as satisfied by his sale, so that on a subsequent foreclosure of the

¹ *Hill v. Pixley*, 63 Barb. (N. Y.) 200.

² *Powell v. Smith*, 30 Mich. 451; *Kellogg v. Ames*, 41 N. Y. 259, reversing 41 Barb. 218; *Skeel v. Spraker*, 8 Paige (N. Y.), 182.

³ *Powell v. Smith*, *supra*.

⁴ *Kellogg v. Ames*, *supra*. The court, Murray, J., delivering the opinion, says, that the purchaser takes the deed with

constructive notice of the existence of the mortgage. It is upon record. He then steps into the former owner's place; he takes his interest and his rights in the land, and no more; the estoppel which was controlling the former owner is also controlling him.

⁵ *Bulkeley v. Hope*, 1 Kay & J. 482; 1 Jur. N. S. 864.

second mortgage the proceeds were first applied to the payment of the second mortgage.¹

855. The intention of the parties at the time of the payment of the mortgage determines the effect of such payment. If it is clear that there was then no intention on the part of the person making the payment, either actual or to be implied from the condition of things then existing, to keep the mortgage alive, it cannot afterwards, upon a change of his intention, or upon a change in the surrounding circumstances, be regarded as a subsisting security.² Thus, where a mortgage was paid without an assignment or discharge of it being made at the time, and no agreement was made for any future assignment of it, and the owner of the estate eighteen years afterwards conveyed the land by warranty, and his grantee obtained an assignment of the mortgage to the first purchaser, it was held that nothing passed by the assignment because it had already been discharged by the payment.³

856. Intention expressed. — Although the question, whether there is a merger, depends not so much upon the kind or form of instrument by which one estate is transferred to the holder of the other as upon the intention of the parties, yet if the intention be declared in such instrument it may control the construction of its effect. But even as against the expressed intention, that which is inferred from the relation of the parties to each other and to others, or from their own interests, may be sufficient to control the construction, especially if the expressions of intention be vague or doubtful.

A recital in a deed from a mortgagor to his mortgagee of the mortgaged land, that the deed was made to cancel the mortgage, may conclude the grantee from denying that fact, so far as the intention was concerned; but the mortgage and the notes remaining in his possession by agreement, he may rely upon his mortgage title as against an intervening attachment.⁴

¹ *Webb v. Meloy*, 32 Wis. 319.

108; *Aiken v. Milwaukee & St. P. R. Co.*

² *Champney v. Coope*, 34 Barb. (N. Y.)

37 Wis. 469; *Hunt v. Hunt*, 14 Pick.

539; *Loome v. Wheelwright*, 3 Sandf. (N.

(Mass.) 374, 383.

Y.) Ch. 157; *Gardner v. Astor*, 3 Johns.

³ *Given v. Marr*, 27 Me. 212.

(N. Y.) Ch. 53; *Cole v. Edgerly*, 48 Me.

⁴ *Crosby v. Chase*, 17 Me. 369.

Where the upholding of a separate mortgage title is essential to the interests of the owner, a reference in a deed to the mortgage as "having been cancelled by assignment" will not effect a merger.¹

On the other hand when a conveyance to a mortgagee is made expressly subject to a right of dower, whereby the intention of the parties is manifest that such a right should be preserved, the purchaser will not be allowed to set up the mortgage as a subsisting title against this right.²

When a person holding an equity of redemption, by a conveyance fraudulent as against the grantor's creditors, takes from the mortgagee a quitclaim deed of all his interest in the premises, containing this clause: "Which said mortgage is hereby cancelled and discharged, the said" grantor "having recently conveyed his interest in the premises to" the grantee, this amounts to an assignment, and not a merger, of the mortgage, if the creditors interfere and take the equity.³

When one erroneously supposing that he owned the equity of redemption of land subject to two mortgages paid to the first mortgagee the amount due on his mortgage, and took a deed in which the mortgagee released, granted, and sold his interest in the land, "meaning hereby to release all the right I have in the premises by virtue of said mortgage, the aforesaid sum having been this day paid me in discharge of said mortgage," this deed was held to operate as a grant of the legal estate, or a satisfied mortgage, and not as an assignment of the debt. The purpose of the mortgagee in making the deed was to be taken into consideration in construing it, and this purpose was to acknowledge payment of the debt and to pass the legal estate. This explanation of the intent of the parties avoids the inference that might be made from the other parts of the deed, that the debt was thereby assigned. Without this evidence of payment furnished by the deed itself, the fact that it was paid and not assigned might be proved by parol.⁴

857. Merger prevented by expressed intention to the con-

¹ *Bean v. Boothby*, 57 Me. 295.

⁴ *Wade v. Howard*, 11 Pick. (Mass.)

² *Campbell v. Knights*, 24 Me. 332.

289; S. C. 6 Ib. 492.

³ *Crosby v. Taylor*, 15 Gray (Mass.),

trary. — The intended construction of a deed of release from the owner of the equity of redemption to the holder of the mortgage may be expressed in the deed itself,¹ as for instance by a declaration that the deed shall not operate as a merger of title, except at the election of the grantee; in which case there will be no merger, unless evidence tending to show such election on his part be shown.² An assignment of the mortgage paid off might be taken to a trustee with an express declaration that the object was to preserve the priority of the lien;³ but the conveyance alone without the declaration is not regarded as conclusive.⁴

When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore if the estate be subject to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it, and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his intention was to preserve the mortgage rather than to extinguish it.⁵

858. Whether the release of a mortgage constitutes a discharge or an assignment depends not so much upon the form of the instrument as upon the relations of the parties to the estate, and their presumed intent derived from the circumstances under which the conveyance is made. If the release is to a party whose duty it is to extinguish the mortgage for the benefit of another, it will be held to operate as a discharge.⁶ If the money be paid by one who has assumed the duty of paying the debt, either by contract with the mortgagor or with those who may have succeeded to his rights, this must be taken as regards other subsequent interests as a payment; consequently, when one who has purchased land by a deed containing an express stipulation that he shall assume and pay an existing mortgage debt

¹ *Bailey v. Richardson*, 9 Hare, 734; *v. Wright*, 1 Sim. & St. 369; and see and see *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Wilkes v. Collin*, L. R. 8 Eq. 338.

² *Spencer v. Ayrault*, 10 N. Y. 202.

³ *Bailey v. Richardson*, *supra*.

⁴ *Hood v. Phillips*, 3 Beav. 513; *Parry*

Gunter v. Gunter, 23 Beav. 571.
⁵ *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; *Davis v. Barrett*, 14 Beav. 542; *Hatch v. Skelton*, 20 Beav. 453.

⁶ *Wadsworth v. Williams*, 100 Mass. 126; see *Wade v. Beldmeir*, 40 Mo. 486.

upon it, payment by him operates as a discharge of the mortgage, whether he take an assignment of the mortgage, an acknowledgment of payment, or a release.¹

859. But a deed of quitclaim from the mortgagee to a third person, who pays the amount due upon a mortgage at the request or with the consent of the mortgagor, operates generally as an assignment, and not as an extinguishment of the mortgage,² unless the latter effect be intended. But a quitclaim deed by the holder of the mortgage, whether the original mortgagee or his assignee, to the owner of the equity of redemption, generally operates to discharge the mortgage, unless there be a good reason why it should not have this effect.³

860. A bequest of the mortgage to the mortgagor would generally merge the lien. But if the interest of the mortgage be given to another for life, and the principal of it to the mortgagor afterwards, the mortgage is kept alive and may be foreclosed during the lifetime of the person entitled to the interest.⁴

861. Parol evidence that an assignment of a mortgage was intended to be a discharge is admissible only for the purpose of proving fraud.⁵ The legal effect of a conveyance cannot be changed by parol evidence.⁶ Yet such evidence is admissible to show the consideration upon which the conveyance was made, and to show the whole transaction where the conveyance constitutes only a part of it; and in this way it may appear that the purchaser is under obligation to pay the mortgage debt, so that an assignment of the mortgage to him constitutes a merger.⁷

¹ Kilborn v. Robbins, 8 Allen (Mass.), 466, expectancy," and it was regarded as an undoubted discharge.

² Freeman v. M'Gaw, 15 Pick. (Mass.) 82; Hunt v. Hunt, 14 Ib. 374. *Contra*, Johnson v. Lewis, 13 Minn. 364.

³ Jerome v. Seymour, Harr. (Mich.) 357; Bassett v. Hathaway, 9 Mich. 28. In this case the holder of the mortgage conveyed to a purchaser of the equity of redemption all his "right, title, interest, claim, and demand, both at law and in equity, whether by deed, mortgage, or otherwise, and as well in possession as in

⁴ Hancock v. Hancock, 22 N. Y. 568.

⁵ Astley v. Milles, 1 Sim. 298, 345; Howard v. Howard, 3 Met. (Mass.) 548; Wade v. Howard, 11 Pick. (Mass.) 289; 6 Ib. 492.

⁶ McCabe v. Swap, 14 Allen (Mass.), 188.

⁷ Frey v. Vanderhoof, 15 Wis. 397; Fiske v. McGregor, 34 N. H. 414; and see Miller v. Fichthorn, 31 Pa. St. 252, 259.

862. Merger in new security or judgment. — It is elsewhere noticed that a mortgage is not necessarily or even usually merged by taking a new mortgage upon the same property for the old debt and further advances, or for the old debt and interest accrued upon it, or assessments paid upon the property; if the original mortgage has not been released,¹ the debt is not merged so as to affect the security by obtaining a judgment upon it, unless it is satisfied in whole or in part, when the debt is of course extinguished to the extent of the sum realized by the execution.²

When additional security is taken for a mortgage debt by a new mortgage upon the same or other property, a merger of the original security may be very readily prevented by a recital in the instrument creating the new security, that it is given by way of further security, or as collateral to the old.³ Of course in most cases, the nature of the transaction and the relations of the parties will be sufficient to show the intention without any such declaration.

863. A mortgage will not be kept alive in aid of a fraud or wrong, although in equity a mortgage substantially satisfied may be kept alive when this is requisite to the advancement of justice; this is never allowed when the result will be through the forms of law to aid in perpetrating a fraud or an injury.⁴

Generally, an assignment of the mortgage cannot be enforced. It is the mortgagee's duty to discharge merely.⁵ But whenever a decree is made that the mortgage upon payment or redemption be assigned, the decree should be limited so as not to prejudice the mortgagee in respect to any other liens he may have acquired upon the property, whether by attachment or otherwise.⁶ In New York, however, it is held that an assignment may be enforced when the mortgage is paid by one who is under no obligation to pay it.⁷ A mortgagor who has sold the mortgaged property subject to the mortgage, upon being compelled subsequently

¹ *Tenison v. Sweeney*, 1 J. & L. 710.

Y.) 22; *Worthington v. Morgan*, 16 Sim.

² See *Bell v. Banks*, 3 Man. & G. 258; 547.

³ *Scott N. R.* 497; *Higgins*, Exp. 3 De G. & J. 33.

⁵ See § 1086; also, *James v. Bion*, 3 Sw. 234; *Colyer v. Colyer*, 9 L. T. N. S.

³ *Twojenney v. Young*, 3 B. & C. 208; *Pennell*, Exp. 2 M. D. & De G. 273; *Whitbread*, Exp. 2 M. D. & De G. 415.

214; *Dunstan v. Patterson*, 2 Ph. 341; *Anon.* 2 Mol. 505.

⁶ *Cilley v. Huse*, 40 N. H. 358.

⁴ *McGiven v. Wheelock*, 7 Barb. (N.

Y.) § 1087.

to pay the debt is subrogated to the rights of the mortgagee, and may require from him an assignment of the bond and mortgage, and if upon tender of the amount the mortgagee refuses to assign, he may be compelled to do so by action.¹

864. When a mortgage debt is paid by one who is bound by contract to pay it, an assignment of it to him upon payment operates as a discharge; and he will not be allowed to hold it as a subsisting incumbrance, as the payment was in pursuance of his agreement, and may be regarded as made with the mortgagor's money.² Under this rule a mortgagor is not allowed, after having obtained a transfer of a first mortgage made by himself, to set it up against another mortgage of later date, which he has also made; and the rule applies equally in case he has obtained the first mortgage title by purchasing at a sale under the power.³

865. Assignment to one who has assumed the payment of the mortgage. — The purchaser of land subject to a mortgage which he has assumed and agreed in the conveyance to himself to pay, upon taking an assignment of it, thereby pays and satisfies it so far as his grantor is concerned;⁴ and as to his grantor, the mortgage is paid and satisfied when such purchaser has paid the mortgage and had an assignment of it made to a third person. Not only is the mortgage extinguished when it is paid by a purchaser who has assumed the payment of it, but also when it is paid by his grantee, or by any grantee after successive conveyances.⁵ The premises in such case become the primary fund for the payment of the mortgage, and whoever acquires that fund and the mortgage also must be regarded as having applied the fund to the payment of the mortgage.⁶

But the taking of a deed containing a recital that the premises are "subject to a mortgage" does not import a promise on the part of the purchaser to pay the mortgage; and does not prevent

¹ *Johnson v. Zink*, 51 N. Y. 333.

² *Brown v. Lapham*, 3 Cush. (Mass.) 554; *Strong v. Converse*, 8 Allen (Mass.), 559; *Butler v. Seward*, 10 Ib. 466; *Bemis v. Call*, 10 Ib. 512; *Wadsworth v. Williams*, 100 Mass. 126.

³ *Otter v. Lord Vaux*, 2 K. & J. 650;

6 De G., M. & G. 638; *Johnson v. Webster*, 4 De G., Mac. & G. 474.

⁴ *Frey v. Vanderhoof*, 15 Wis. 397; *Mickles v. Townsend*, 18 N. Y. 575; *Russell v. Pistor*, 7 N. Y. 171.

⁵ *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29.

⁶ *Lilly v. Palmer*, 51 Ill. 331.

his holding the mortgage as a subsisting title upon a subsequent assignment of it to him.¹

866. This principle is of frequent application in determining the right of the mortgagor's widow to dower. — The widow is clearly dowerable in an equity of redemption; but if she has relinquished her right of dower in the mortgage, she cannot recover it against the mortgagee or his assignee in possession, unless the mortgage has been assigned to one who is under obligation to pay and discharge the mortgage.² Her dower is subject to the mortgage, and if this be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, in order to avail herself of this right she is obliged to contribute her proportion of the charge, according to the value of her interest.³

If, however, the purchaser of the equity of redemption from the original mortgagor has assumed and agreed to pay the mortgage, and the wife of the mortgagor has released her dower in the mortgage but not in the deed to the purchaser, he cannot, upon taking an assignment of the mortgage, set it up against the claim of the widow of the mortgagor for her dower, but the assignment will be held to operate as a discharge, and the widow will be entitled to her dower in the whole estate.⁴

Where a mortgagee who had entered for foreclosure conveys his interest by quitclaim deed to one who has purchased the equity of redemption from the mortgagor's assignee in insolvency, the mortgage is not extinguished by merger, so as to let in a right of dower in the mortgagor's widow who released dower in the mortgage.⁵

This rule is fully approved in a recent case in Missouri, where a purchaser of an equity of redemption from an assignee in insolvency of the mortgagor, without taking an assignment of the mortgage, or making any attempt to keep it alive, paid it off. Although the wife of the mortgagor relinquished dower in the mortgage, yet, the mortgage having been cancelled and dis-

¹ *Strong v. Converse*, 8 Allen (Mass.), 557; *Pike v. Goodnow*, 12 Ib. 472; *Campbell v. Knights*, 24 Me. 332. See § 748.

³ *Norris v. Morrison*, 45 N. H. 490.

² *Farwell v. Cotting*, 8 Allen (Mass.), 211.

⁴ *McCabe v. Swap*, 14 Allen (Mass.), 188.

⁵ *Savage v. Hall*, 12 Gray (Mass.), 363.

charged without any mistake on the part of purchaser in doing so, the wife upon the death of her husband was held to be entitled to dower in the whole estate.¹

But where the assignee in insolvency of the mortgagor pays the mortgage, in which the wife had released dower, out of the assets of the estate, and takes an assignment of the mortgage to himself, it remains an outstanding title against which the widow of the insolvent cannot have dower.² So, if the mortgage be discharged by the heir or other person claiming under the husband, with no obligation imposed upon him to pay the mortgage, the widow takes her dower subject to the incumbrance of the mortgage debt. And even where the purchaser of an equity of redemption from the administrator of an insolvent estate gave a bond obligating himself to pay the mortgage debt, it was held that he might set up the mortgage title against the widow, because the obligation to pay the debt is in such case to be regarded merely as a personal contract of indemnity, in which the widow had no interest.³

But if an heir, for the purpose of preventing a sale of the real estate of the deceased for the payment of debts, gives a bond for their payment and takes an assignment of a mortgage upon part of the real estate to himself, the bond may be regarded as supplying the place of assets, which would otherwise have been derived from a sale of the lands, which would have left the rights of dower and homestead unaffected; and it is suggested that in such case the assignee should not be allowed to defeat these rights by holding the mortgage as an outstanding title and foreclosing it; and it was held that at any rate the heir could not do this after the estates of dower and homestead had in fact been set out to the widow, before the payment of the mortgage debt, with his assent.⁴

867. Payment by one who has warranted against incumbrances. — One who has executed two mortgages to different persons upon the same land, with covenants of warranty, upon redeeming the first mortgage, in fact pays his own debt, and thereby discharges the mortgage, and cannot set it up as the

¹ *Atkinson v. Angert*, 46 Mo. 515.

³ *Gibson v. Crehore*, 3 Pick. (Mass.)

² *Sargeant v. Fuller*, 105 Mass. 119; 475; and 5 Pick. (Mass.) 147.

see, however, *Atkinson v. Stewart*, 46 Mo. ⁴ *King v. King*, 100 Mass. 224.

510; *Jones v. Bragg*, 33 Mo. 337.

ground of a claim to redeem the second after that has been foreclosed. The payment of the mortgage when it was his duty to pay it gives him no right to be regarded as an equitable assignee of it, and to be subrogated to the rights of the first mortgagee. The covenants of warranty in the second mortgage also estop him from setting up the first mortgage against the second mortgagee.¹

Upon this principle, also, when one who has conveyed land with warranty, which is subject to a mortgage, whether made by him or by another, afterwards takes an assignment of such mortgage, he holds it for the benefit of the person to whom he has granted the land, and the mortgage is in fact discharged by coming into his hands. Even if he should assign it to one who in good faith pays full consideration for it, the purchaser would acquire no lien upon the land.²

When one sells land by warranty a mortgage held by him upon the land at that time is extinguished, unless it was understood by the grantee that it should be continued in force for his benefit;³ but this rule, of course, does not apply to a mortgage taken for the purchase money of a sale, although the mortgage bear an earlier date than the deed of sale.⁴ In like manner if the owner mortgage the estate without noticing the mortgage title held by him, it is regarded as merged.⁵

868. An assignment to the owner of the equity of redemption who is not the original mortgagor, but a subsequent purchaser, will not generally operate as a discharge or merger of the mortgage, because it is his manifest interest to hold the two different titles distinct, if he has any occasion for protection against any other intervening interest or title.⁶ In such case it is immaterial whether the transfer be effected by an assignment in the usual form, or by a deed of release or quitclaim. If such purchaser of the equity of redemption obtains an assignment of the mortgage pending a bill against the mortgagor for a foreclosure,

¹ *Butler v. Seward*, 10 Allen (Mass.), 466. Otherwise under a quitclaim deed. *Comstock v. Smith*, 13 Pick. (Mass.) 116; *Trull v. Eastman*, 3 Met. (Mass.) 121.

² *Mickles v. Townsend*, 18 N. Y. 575; *Collins v. Torrey*, 7 Johns. (N. Y.) 278.

³ *Stoddard v. Rotton*, 5 Bosw. (N. Y.) 378.

⁴ *Fish v. Gordon*, 10 Vt. 288.

⁵ *Tyler v. Lake*, 4 Sim. 351.

⁶ *Savage v. Hall*, 12 Gray (Mass.), 363; *Grover v. Thatcher*, 4 Ib. 526; *Wyman v. Hooper*, 2 Ib. 141, 145; *Lond v. Lane*, 8 Met. (Mass.) 517; *Pitts v. Aldrich*, 11 Allen (Mass.), 39.

he may, with the consent of the mortgagee, prosecute the suit to a decree of foreclosure and sale, for the purpose of more effectually securing his title.¹

Some of the earlier cases in England seemed to incline strongly against allowing a purchaser of the equity of redemption to keep up a mortgage charge upon the property for his own benefit, and to defeat subsequent incumbrances; but the later cases hold that such purchaser, having paid off a first mortgage, may, when he has shown an intention of doing so, stand in the first mortgagee's place against the next incumbrancer.²

869. Payment of mortgage by purchaser of the equity of redemption.—The rule that payment by a mortgagor extinguishes the mortgage is founded upon the reason that there could generally be no advantage to him in keeping on foot his own mortgage against his own estate. But no such reason exists when a purchaser pays an incumbrance existing before the time of his purchase. Very frequently in such case there is an advantage in keeping the mortgage on foot as a security; and whenever there is such advantage the purchaser is entitled to hold it as a separate title.³

If a mortgage be paid by a person not personally liable, for the purpose of protecting his estate, he may have the benefit of it in aid of his title, without any assignment to him, or proof of an intention on his part to keep it alive.⁴ And even if the mortgage be discharged of record without consideration, but for the sole benefit of the owner of the equity, the mortgage is not extinguished as to a subsequent mortgagee; but he must redeem this mortgage from such owner before he will be allowed to foreclose his own mortgage.⁵ If, however, there be any obligation on his part to pay the debt, he cannot stand upon the mortgage paid to help his title as against the party whom he is bound to protect against the mortgage.⁶

¹ *Mobile Branch Bank v. Hunt*, 8 Ala. Chandler, 7 Me. 377; *Carll v. Butman*, Ib. 102.

² *Watts v. Symes*, 1 De G., Mac. & G. 240, reviewing the earlier cases. ⁴ *Walker v. King*, 44 Vt. 601; *Walker v. King*, 45 Vt. 525; *Wheeler v. Willard*, 44 Vt. 640; *Warren v. Warren*, 30 Vt. 530.

³ *Abbott v. Kasson*, 72 Pa. St. 183; *Millspaugh v. McBride*, 7 Paige (N. Y.), 509; *Skeel v. Spraker*, 8 Paige (N. Y.), 182; *Pool v. Hathaway*, 22 Me. 85; *Hatch v. Kimball*, 16 Me. 146; *Thompson v.*

⁵ *Spaulding v. Crane*, 46 Vt. 292.

⁶ *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274.

If, however, the incumbrance be paid by a mere volunteer or stranger to the title, having no interest to make the payment for his own protection, the payment is not compulsory, and the party paying cannot be treated as an equitable assignee of the mortgage.¹

870. Acquisition of the equity of redemption by the mortgagee. — Although, as elsewhere explained, the purchase of the mortgagor's equity of redemption by the mortgagee is looked upon with suspicion by the courts, because he has, by reason of his position as creditor, a certain advantage over the mortgagor which may be abused, yet if the purchase be free from fraud, and for an adequate price, it is sustained.² This objection, however, does not apply with equal force when he purchases the equity of redemption from one who has purchased it of the mortgagor, or when he purchases at an execution sale had at the instance of a stranger. The mortgagee, while he is not generally permitted to sell the equity of redemption under an execution obtained upon the mortgage debt, may generally do so under an execution for any other debt to him, and may purchase at the sale. But the result of his acquiring the equity of redemption in either way is generally to merge his mortgage title in it, unless there be some reason why he should keep the titles separate.³

When a mortgagor pays his mortgage debt, his object is generally to fulfil the personal obligation of payment, and relieve his estate of the incumbrance.

When a mortgagee acquires the equity of redemption it is generally because he wants a settlement, and can get nothing more than the full control of the property, or else because he has use for the mortgage land, and wants an absolute title to it. In either case his primary object is to perfect the title in himself. It must follow therefore that while, as a general rule, the mortgagor's intention is to extinguish the mortgage, the mortgagee on the other hand almost always desires to hold the title he has, and simply to acquire the title which he has not. Hence it will be noticed in examining these two classes of cases, that a merger of the estates occurs much more frequently in the mortgagor than in the mort-

¹ Downer v. Wilson, 33 Vt. 1.

² Barnes v. Brown, *supra*; Weiner v.

³ See, also, Barnes v. Brown, 71 N. C. Heintz, 17 Ill. 259.

507; West v. Reed, 55 Ill. 242. § 1042.

gagee, and that the expressions against a merger are much more decided when the estates unite in the latter than when they unite in the former; the different relations in which the two persons stand to the debt and to the property account for this: their intentions are generally different.

There is, generally, an advantage to the mortgagee in preserving his mortgage title; and when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, if such appears to have been the intention of the parties and justice requires it.¹

If the mortgagee has already transferred his mortgage as collateral security for the payment of a debt at the time he purchased the equity of redemption, there can be no pretence that a merger takes place, for the different estates in such case do not vest in the same person.² Nor can there reasonably be any such pretence when the deed itself to the mortgagee refers to the mortgage as a subsisting lien, and is expressly made subject to it.³

871. If a mortgagee purchase the equity of redemption, and give up the mortgage note without intending this to operate as a payment, the mortgage not being discharged, there is no merger or extinguishment of the mortgage, as against an intervening title, as for instance by levy, judgment, or conveyance.⁴ The assignee of a mortgage covering two separate parcels of land, having purchased one of them, can collect only the ratable proportion from the other;⁵ and so if the assignee of a mortgage take a conveyance of the equity of redemption of one half of the mortgaged premises described as one lot, this operates to extin-

¹ *Mulford v. Peterson*, 35 N. J. L. 127; *Duncan v. Smith*, 2 Vroom (N. J.), 325; *Thompson v. Boyd*, 1 Zab. (N. J.) 58; S. C. 2 Ib. 543; *Woodhull v. Reid*, 1 Harr. (N. J.) 128; *Freeman v. Paul*, 3 Me. 260; *Mallory v. Hitchcock*, 29 Conn. 127; *Wickersham v. Reeves*, 1 Iowa, 413; *Knowles v. Lawton*, 18 Ga. 476; *Fithian v. Corwin*, 17 Ohio St. 118; *Walker v. Baxter*, 26 Vt. 710; *Forbes v. Moffatt*, 18 Ves. 384 a; *Slocum v. Catlin*, 22 Vt. 137.

² *Campbell v. Vedder*, 1 Abb. (N. Y.) App. Dec. 295; *Kellogg v. Ames*, 41 N. Y. 259, reversing 41 Barb. 218; *White v. Hampton*, 13 Iowa, 259.

³ *Campbell v. Vedder*, *supra*; *Sheldon v. Edwards*, 35 N. Y. 279.

⁴ *New Eng. Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390; *Mulford v. Peterson*, 35 N. J. L. 127; *Walker v. Baxter*, 26 Vt. 710.

⁵ *Colton v. Colton*, 3 Phil. (Pa.) 24.

guish only a part of the mortgage debt, leaving the assignee at liberty to foreclose for the residue.¹

872. Purchasers cannot rely upon the record as showing merger. — Inasmuch, therefore, as merger takes place or not, according to the actual or presumed intention of the mortgagee, subsequent purchasers cannot rely upon the record as showing merger. They must go beyond this, and ascertain whether there has been a merger in fact; and they act at their own peril if they do not require their grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title to the estate.² If there has been no merger, and the mortgage title remains as a separate interest, it is, of course, essential for the purchaser to purchase this title, as well as the equity of redemption; but, as has elsewhere been shown, one who buys a mortgage without requiring the delivery of the mortgage note or bond is chargeable with notice that it has been assigned to some one else: he is not a purchaser in good faith, but is chargeable with knowledge of fraud. Therefore, although he may purchase from one who by the records appears to be the owner of the entire estate, holding the equity of redemption from one source and the mortgage from another, and although he takes a conveyance with full covenants of warranty, it may turn out that some other person has a valid title to the mortgage.³

873. Such acquisition may be regarded as an extinguishment of the equity rather than a merger of the mortgage. — When a mortgagor releases to his mortgagee, instead of regarding the result to be a merger at law of one estate in the other, it may more properly, perhaps, under the common law doctrine of mortgages, be deemed to be merely an extinguishment of the right of redemption. This was the view taken by Mr. Justice Story in a case before him in the United States Circuit Court.⁴

¹ *Klock v. Cronkhite*, 1 Hill (N. Y.), 107.

² *Aiken v. Milwaukee & St. Paul R. R. Co.* 37 Wis. 469; *Morgan v. Hammett*, 34 Wis. 512.

³ *Purdy v. Huntington*, 42 N. Y. 334.

⁴ *Dexter v. Harris*, 2 Mason, 531; and

see *Stantons v. Thompson*, 49 N. H. 272, where a release of the equity of redemption had been made to the mortgagee. Chief Justice Bellows said: "It was not the drowning of a lesser estate, for the estate was already a fee simple. This is certainly more in accordance with the or-

“As to the merger,” he said, “it is clear that there can be no such operation, as the argument supposes. At law, by the mortgage, a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich would be to extinguish the equity of redemption, and thus to remove the condition. If that conveyance was good, it had the effect not to nelarge the estate, but to extinguish a right. It was not the drowning of a lesser in a greater estate, for the estate was already a fee simple; but it was an extinguishment of the condition or equity.” Of course this doctrine would not be held where a mortgage is regarded not as an estate in fee, but merely as a lien, the fee and general ownership remaining in the mortgagor; but the lesser interest would merge in the greater.

Even when the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. “This is based upon the presumption as matter of law,” says Chief Justice Bellows of New Hampshire,¹ “that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties through ignorance of such intervening title, or through inadvertence, actually discharged the mortgage and cancelled the notes, and really intended to extinguish them; still, on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title Of course, cases might be conceived when the purpose to extinguish the mortgage, notwithstanding an intervening title, was clearly manifested, as when the very object was to postpone the first to a second mortgage, and the mortgagor was willing to surrender

dinary understanding upon the subject, which looks upon such a release in general as merely a foreclosure of the mortgage, and not an extinguishment of it, and that is shown by the fact that these releases are usually without warranty of title. If we look then to the intention of the parties, in determining whether there is a merger

of the mortgage title or not, we should ordinarily find that there was no intention to extinguish the mortgage title, but to make it absolute, as by any other mode of foreclosure, and thus to apply the property pledged to the satisfaction of the debt.”

¹ *Stantons v. Thompson*, 49 N. H. 272

his interest to effect that object. In such a case it would be unjust to the mortgagor to uphold the first mortgage, and it would not be done; but in ordinary cases it would be just to allow the person in whom the two estates were united, to keep on foot his mortgage as security against an intervening title, in respect to which he had come under no obligations either to the holder or the mortgagor."

It may, therefore, be deduced from the authorities as a general rule, that when the mortgagee acquires the equity of redemption in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance.¹ The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend.

Where a purchaser of the equity of redemption conveyed the land by warranty deed to the mortgagee, but did not take up the original notes or procure a discharge, but on the other hand took a bond for a conveyance of the land upon the payment of the original notes within a limited time, it was held that the mortgage was not discharged, nor was an absolute title vested in the mortgagee subject only to the stipulations of the bond, but that the transaction was merely a reaffirming of the mortgage, with an extension of the time of payment.²

PART II.

SUBROGATION.

874. Subrogation arises by operation of law whenever the mortgage debt has been extinguished by one other than the debtor, entitled to redeem. An assignment implies a continued existence of the debt, and the equitable right does not then arise.³ "The subrogation or substitution, by operation of law, to the rights and interests of the mortgagee in the land is on and by redemption; and redemption is payment of the mortgage debt, after forfeiture, by the terms of the mortgage contract; so that,

¹ *Stantons v. Thompson*, *supra* · Besser v. Hawthorne, 3 Oregon, 129.

² *Bailey v. Myrick*, 50 Me. 171.

³ Per Mr. Justice Colt, in *Lamb v. Montague*, 112 Mass. 352.

really the subrogation or substitution, by operation of law, arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond and mortgage assigns them to a party claiming a right to redeem, the latter is subrogated, by the assignment, to the mortgage debt and mortgage security, and to the instruments evidencing such debt and security, and there is no room or occasion for subrogation by operation of law.”¹

“Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim; or it arises from the transactions of principals and sureties, and sometimes between co-sureties or co-guarantors. It is not allowed to volunteer purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and never to mere meddlers. But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor.”² A purchaser at a foreclosure sale, supposing that he had obtained a good title by his purchase, sold the land to another by warranty deed. The mortgagor having recovered the land on account of irregularities in the foreclosure sale, the purchaser at the foreclosure sale was sued upon his covenant of warranty in his deed of the property, and was obliged to pay the value of it. But it was held that he was entitled to be subrogated to the rights of the mortgagee, as an equitable assignee.³

Under the equitable principle of subrogation, one who pays a debt for the benefit of another, whether voluntarily or for his own protection, acquires a right to the security held by the other; and upon the same principle a principal creditor succeeds to the security held by a surety whose liability has become fixed.

If the surety's liability has never become fixed and absolute, either by his having been obliged to pay the debt for which he is surety or by a judgment against him, the principal creditor cannot claim the security by subrogation.⁴

The right of subrogation applies in general in favor of any person who, not being under any obligation to pay the mortgage debt,

¹ Per Mr. Justice Sutherland, in *Ellsworth v. Lockwood*, 42 N. Y. 89, 97.

³ *Muir v. Berkshire*, *supra*.

² Per Chief Justice Biddle, *Muir v. Berkshire*, 52 Ind. 149.

⁴ *Grant v. Ludlow*, 8 Ohio St. 1; *McCullum v. Hinckley*, 9 Vt. 149; *Planters, Bank v. Donglass*, 2 Head (Tenn.), 699.

does so for the benefit of the debtor ;¹ as by furnishing money to the mortgagor to take up the mortgage under an agreement to execute a new one ;² or by a purchaser's paying a judgment in *scire facias* against the mortgagor.³ So, also, a junior incumbrancer who pays a prior incumbrance upon the property is thereby subrogated to the security.⁴

875. The rule as to marshalling assets applies as between different creditors, so that where one has two funds and the other only one of them, the former is required to satisfy his claim out of the fund upon which the other has no lien. It is not applicable as between a debtor and creditor ; and the mortgagor cannot compel a mortgagee to resort to the land, the equity of redemption of which has been sold on execution, instead of proceeding on the mortgage note to collect the debt.⁵

876. The test of the right of subrogation is found in answer to the inquiry whether the person who paid the mortgage debt is the one whose duty it was to pay it first of all ; if the debt was not primarily his, and he only occupied the position of surety to the mortgagor, he is entitled to be subrogated to the position of the mortgagee when he has paid the debt.⁶

A mortgage discharged of record may be reinstated when it has been paid by one who had bought the premises subject to the mortgage, and in ignorance of the existence of a judgment lien subsequent to the mortgage. Upon payment he was entitled to all the rights of the mortgage, and, according to the law in New York, to an assignment of the mortgage ; and having caused it to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give him the benefit of the equitable right of subrogation.⁷

877. When a mortgage is paid by one who is under no

¹ *Carter v. Taylor*, 3 Head (Tenn.), 30 ;
Roddy's Appeal, 72 Pa. St. 98.

² *Lockwood v. Marsh*, 3 Nev. 138.

³ *Matteson v. Thomas*, 41 Ill. 110.

⁴ *Dings v. Parshall*, 7 Hun (N. Y.),
 522 ; *Ellsworth v. Lockwood*, 42 N. Y.
 89, 96 ; *Brainard v. Cooper*, 10 N. Y.
 356.

⁵ *Rogers v. Meyers*, 68 Ill. 92. See § 728

⁶ *Russell v. Pistor*, 7 N. Y. 171 ; *Klock
 v. Cronkhite*, 1 Hill (N. Y.), 107 ; *Tice v.
 Annin*, 2 Johns. (N. Y.) Ch. 125 ; *Mc-
 Given v. Wheelock*, 7 Barb. (N. Y.) 22 ;
Rogers v. Traders' Ins. Co. 6 Paige (N.
 Y.), 583.

⁷ *Barnes v. Mott*, 64 N. Y. 397.

obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the title so acquired as against subsequent incumbrances, although he had also acquired the equity of redemption. In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage, together with his relation to the estate, bring it in aid of his title to strengthen and uphold it.¹

When a third person, at the instance of the mortgagor, pays part of the mortgage debt, but takes no assignment of the mortgage, and no agreement for any, he is not thereby subrogated to the right of the mortgagee as against a subsequent incumbrance: to effect such subrogation there must be something more than mere payment, and silent receipt of the money by the mortgagee.²

Even if a person advancing money to pay a mortgage under an agreement with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is entitled to be subrogated to the rights of the mortgagee and have the discharge vacated.³

878. Where a mortgagee has been compelled, for his own protection, to pay the amount of a prior mortgage upon the property, and instead of taking an assignment of the mortgage so paid, this is discharged of record, he is nevertheless entitled to indemnify himself for this payment out of the mortgaged estate. But if, in the mean time, a *bond fide* purchaser, relying upon the record, has bought the estate subject only to the second mortgage, the amount of the first mortgage so paid could not, it would seem, be claimed out of the estate as against him. Where, however, the whole amount claimed by the junior mortgagee upon his own mortgage, and that paid off by him was less than the amount of his own mortgage and interest as it stood upon record, he was

¹ Walker v. King, 45 Vt. 525; 44 Ib. 601, and see cases cited; Wheeler v. Willard, 44 Vt. 640; Tichout v. Harmon, 2 Aik. (Vt.) 37; Robinson v. Urquhart, 12 N. J. Eq. (1 Beas.) 515; White v. Hampton, 13 Iowa, 259.

² Virginia v. Ches. & Ohio Canal Co. 32 Md. 501, 546; Swan v. Patterson, 7 Md. 164.

³ Morgan v. Hammett, 23 Wis. 30.

allowed, in a suit against him for redemption, to reimburse himself for the sum so paid.¹

When a junior incumbrancer redeems from a prior lien, intermediate or subsequent incumbrancers, in equity, must refund the redemption money, or pay all liens anterior to theirs before they can enforce their claims upon the property. The junior mortgagee, by redeeming from the prior mortgage, is subrogated to the rights of the first mortgagee. If it were otherwise, it would be impossible, in a large number of cases, for a junior mortgagee to secure his debt, as the first mortgagee is not obliged to assign his mortgage on payment.²

The same rule prevails when the mortgagor sells and conveys a portion of the mortgaged premises, subject to the mortgage, and the purchaser retains enough of the purchase money to satisfy the mortgage and agrees to pay it; the mortgagor and purchaser stand in the relation of principal and surety as to the mortgage debt, and the premises sold are primarily chargeable with the payment of it.³

If one joint mortgagor, in order to protect his interest, pays the joint debt, he is subrogated to the interest of his joint mortgagor until he is repaid.⁴

879. If a mortgagor purchase his own mortgage on land that he has sold subject to the mortgage which the purchaser has agreed to pay as part of the consideration of the sale, the bond or note is, of course, rendered unavailing; but the mortgage having become the principal security for the payment of the debt, the mortgagor, without taking an assignment of the mortgage, is entitled to be subrogated to this security, and to be repaid out of the land what he has paid upon the mortgage debt.⁵

If the mortgagee, with knowledge of the mortgagor's right to have the property applied to the payment of the mortgage debt, does anything to impair this right, as for instance if he releases a portion of the mortgaged premises, he must suffer the loss himself, by being deprived to that extent of his right of recourse to

¹ *Davis v. Winn*, 2 Allen (Mass.), 111.

⁴ *Fisher v. Dillon*, 62 Ill. 379.

² *Flachs v. Kelly*, 30 Ill. 462; *Downer v. Fox*, 20 Vt. 388. See § 1086.

⁵ *Stillman v. Stillman*, 21 N. J. Eq. 126.

³ *Russell v. Pistor*, 7 N. Y. 171; *Halsey v. Reed*, 9 Paige (N. Y.), 446.

the mortgagor, who, in such case, stands in the position of a surety.¹

880. When mortgage is enforced upon other property of the mortgagor.—When an equity of redemption has been sold upon execution for a debt other than that secured by mortgage on the premises, the purchaser acquires only an estate subject to the mortgage debt, and if this be subsequently enforced from other property of the mortgagor, he will be subrogated to all the rights of the mortgagee under this mortgage, and thus protect himself against the purchaser under execution. The rule is the same where sale is made of a part of the mortgaged premises under execution obtained upon one of several mortgage notes. The purchaser takes the property subject to the payment of a share of the mortgage debt remaining unsatisfied.²

881. An indorser or surety of a note upon being compelled to pay it is entitled to the benefit of any security, as for instance a mortgage given by the principal debtor to the holder of the note to secure it. Without any assignment of it he is by force of law subrogated to the benefit of it.³ In like manner, when a mortgage has been assigned by a debtor to a surety or indorser, or to a trustee for his benefit, to secure him against his liability upon the debt, the creditor is entitled to the benefit of the security.⁴ The mortgage creates a trust and equitable lien in favor of the creditor, and this lien attaches to the property in his favor, although the mortgage be assigned.⁵

In like manner, if the mortgagor sells the premises subject to the mortgage, and afterwards either pays the mortgage debt voluntarily, or it is collected of him by suit, he is subrogated to the rights of the mortgagee, and may enforce the mortgage upon the

¹ *Ingalls v. Morgan*, 10 N. Y. 187; and see *Eddy v. Traver*, 6 Paige (N. Y.), 521; *Cheesebrough v. Millard*, 1 Johns. (N. Y.) Ch. 412.

² *Funk v. McReynold*, 33 Ill. 481.

³ *Drew v. Lockett*, 32 Beavan, 499; *O'Hara v. Haas*, 46 Miss. 374; *Gossin v. Brown*, 11 Pa. St. 527; *Muller v. Wadlington*, 5 S. C. 342; *Ottman v. Moak*, 3 Sandf. (N. Y.) Ch. 431.

⁴ *Curtis v. Tyler*, 9 Paige (N. Y.), 432; *Cullum v. Branch Bank of Mobile*, 23 Ala. 797; as to the right of a co-surety to the benefit of the security, see *Hall v. Cushman*, 16 N. H. 462; *Low v. Smart*, 5 Ib. 353.

⁵ *Eastman v. Foster*, 8 Met. (Mass.) 19; *Graydon v. Church*, 7 Mich. 36.

land.¹ In such case the mortgagor, as between himself and his grantee, is a mere surety for the payment of the debt, and the premises are the primary fund, and he is entitled to the benefit of it.²

A mortgage given to several guarantors of a debt to indemnify them against a joint and several liability upon it when the debt is paid by one of them, is held in trust by the mortgagees for his benefit.³

882. Whether surety is subrogated to the debt as well as the security. — A distinction is taken in the English cases, which, however, does not generally hold good in this country, to the effect that while the surety, upon paying the debt of his principal, is entitled to the full benefit of all *collateral* securities which the creditor has taken for the payment of the debt, yet he is not entitled to stand in the creditor's place as to the debt itself.

"It is a general rule," says Lord Eldon,⁴ "that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal, but then the nature of those securities must be considered: when there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished; the general rule, therefore, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor; in the case for instance where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor."

¹ Baker v. Terrell, 8 Minn. 195.

² Johnson v. Zink, 52 Barb. (N. Y.) 396.

³ Dye v. Mann, 10 Mich. 291.

⁴ See Copis v. Middleton, T. & R. 224, 229. See, also, 1 Story's Eq. §§ 499, 499 b; Hodgson v. Shaw, 3 Myl. & K. 190; Craythorne v. Swinburne, 14 Ves. 159.

In Hodgson v. Shaw, *supra*, the Chancellor,

Lord Brougham, said: "The principles upon which Copis v. Middleton rests are sound and unquestionable; and it is only upon a narrow and superficial view of the subject that the decision has ever been charged with refinement or subtlety. The ground of the determination was clear: it was founded in the known rules of law, and determined in strict conformity with the doctrines of this court."

But if the debt in the above case had been paid, not by the surety bound in the same obligation with the principal, but by a third party, who had, by a separate instrument, made himself liable for the same debt, it is clear that the reason upon which the decision rested would have failed altogether; the surety would then be entitled to stand in the shoes of the creditor in regard to the original debt as well as in regard to the security,¹ for the original debt is not in that case paid.

As already intimated, the distinction above taken is not generally maintained by the cases in this country. The doctrine of the cases here is, that upon the payment of a debt by the surety, he is entitled not only to the benefit of the collateral security but also to the benefit of the debt as represented by a bond or note, and to an assignment of them as well as of the mortgage, if an assignment is necessary in order to give him the full benefit of the same.²

After a purchaser of a portion of the mortgaged estate has assumed the payment of the whole mortgage, a purchaser of another portion, upon being obliged for his own protection to pay it, is subrogated not only to the mortgagee's right against the land, but also to his right to hold the purchaser, who has assumed the debt, personally liable for the payment of it.³

883. Surety subrogated to securities given after the original contract. — The surety is entitled, upon paying the debt, to securities given by the debtor after the contract of suretyship as well as those given before or at the same time; and whether the surety knows of the existence of the securities is wholly immaterial.⁴ If he pays off part of the mortgage debt, he is entitled as against the mortgagor to charge upon the estate the amount he has so paid.⁵ He is entitled, too, not only to the equities which the creditor holds against the principal debtor, but also to those he has against all persons claiming under him.⁶

884. When the creditor has made a further advance upon

¹ *Hodgson v. Shaw*, 3 Myl. & K. 183, 193.

² *Ellsworth v. Lockwood*, 42 N. Y. 89, 98, and cases cited.

³ *Rardin v. Walpole*, 38 Ind. 146, and cases cited.

⁴ *Mayhew v. Crickett*, 2 Swanst. 185, 191, and see *Curtis v. Tyler*, 9 Paige (N. Y.), 432.

⁵ *Gedye v. Matson*, 25 Beav. 310.

⁶ *Drew v. Lockett*, 32 Beav. 499.

the mortgage. — But a surety is not entitled to an assignment from the creditor of a mortgage upon which the creditor has, after first taking it, made a further advance, unless he pays off such advance in addition to the original sum for which he became surety;¹ and the mortgagee not being prevented from making the further advance, it is immaterial that the surety did not know of it, and it was not contemplated at the time of the original loan.² But where there is a special contract on the part of the creditor that the securities given by the principal debtor shall be primarily liable, or that the surety may redeem upon paying a certain sum, the creditor cannot, as against him, make a further loan to the debtor, but must transfer the securities upon a tender from the surety of the amount of the original loan.³

Where a loan of £5,000 was made in two distinct sums, one for £2,000 and one for £3,000, and distinct properties were mortgaged by separate deeds to secure these sums, for the payment of the former of which a third person also became surety, it was held that the creditor's right to retain all the securities until both sums were paid was superior to the right of the surety to have the benefit of the mortgage for that debt, for which he was surety.⁴

885. Right of subrogation not lost by a renewal of the mortgage. — When a junior incumbrancer pays off a prior incumbrance his right to be subrogated to the position of the prior mortgagee is not destroyed by reason of his taking from the mortgagor a new mortgage for the amount of both the mortgages, and

¹ *Williams v. Owen*, 13 Sim. 597.

² *Ib.*

³ *Bowker v. Bull*, 1 Sim. (N. S.) 29. In this case the debtor mortgaged his own property, and his daughters, to secure his debt, mortgaged their own estate; but the deed contained a proviso that the father's property should be primarily liable.

⁴ *Farebrother v. Wodehouse*, 23 Beav. 18, 23. The Master of the Rolls said: "It is clear that the mortgagee may contract with the mortgagor, or with his surety, that this right of separate redemption shall exist in either or both of them. In the absence of contract, I think that the fact that a third person has become surety

for one of the debts does not deprive the mortgagee of his right to tack. If it did, it would, in most cases, enable the mortgagor to do, in the name of his surety, what he is not able to do in his own name. I am therefore of opinion that the surety, by offering to pay, or by voluntarily paying to the creditor, the debt for which he has become surety, could not redeem the particular property which was made the subject of that mortgage, without also paying the other debt due from the mortgagor to the mortgagee, and thus redeeming the whole property. In other words, I am of opinion that, in this respect, he can do no more than the mortgagor himself could do."

although the new mortgage be void on account of usury. The mortgagee is equitably entitled to the same benefits of redemption that he would have had without such renewal of the mortgages with the mortgagor. By paying the prior mortgage debt he becomes entitled to a cession of the debt and a subrogation to all the rights of the mortgagee, and the mortgage, as against the mortgagor, is to be regarded as still existing and uncanceled. Only the subsequent mortgage is regarded as void under the usury laws.¹

¹ *Patterson v. Birdsall*, 64 N. Y. 294; S. C. 6 Hun, 632.



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